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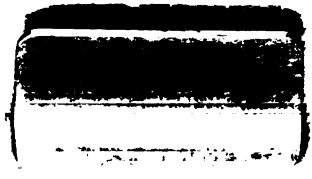

THE EVOLUTION OF PARLIAMENT

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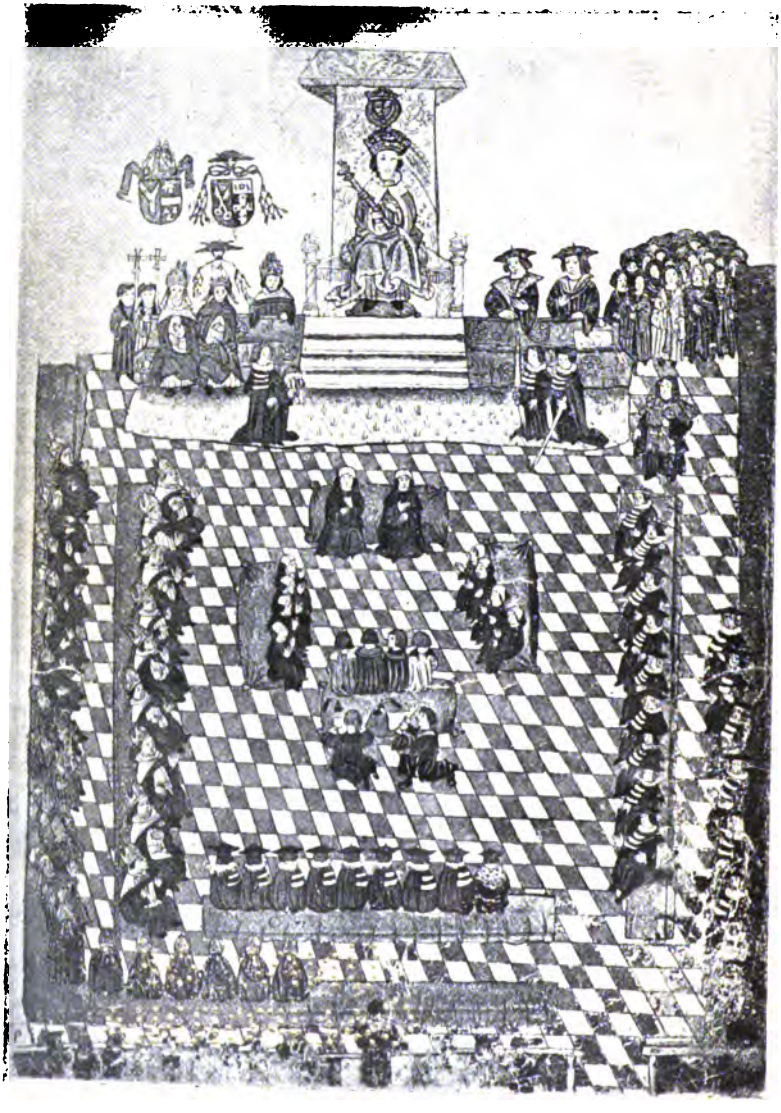

PARLIAMENT IN 1523.

PREFACE

THIS volume is the outcome of studies which were turned in the direction of constitutional history partly by my appointment to a chair with that title at University College, London, in 1903, and more specifically by my election in 1908 to a fellowship at All Souls' College, Oxford, on condition of pursuing researches suggested by the late F. W. Maitland. The first sketch of this essay took the form of six public lectures delivered in London in Lent Term 1913, which were expanded into fifteen lectures given on the Goldwin Smith foundation at Cornell University and elsewhere in the United States in the following spring. The manuscript was completed, save for some notes and references, in August 1915, when the increasing tension of the war put a stop to remoter studies.

During these seventeen years the history of the English parliament has attracted the labour of several learned historians, and particular acknowledgement is due to Professor C. H. McIlwain's *High Court of Parliament*, which, coming into my hands at the end of 1912, confirmed the trend of my investigations and supplied me with fresh ideas and illustrations. Another American book, Professor Baldwin's *King's Council in the Middle Ages*, published in 1914, threw valuable light on a collateral subject. But the starting-point for all of us has been Maitland's introduction to the *Memoranda de Parliamento*, which he edited for the Rolls Series in 1893, the most original and suggestive essay

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that has ever been written on the medieval English parliament. There would have been less reason for this book, had that essay, which is still on sale in its original limited edition, not been buried in the Rolls Series, excluded from disinterment in Maitland's *Collected Papers*, and generally ignored by English instructors of youth for nearly a generation.

A student who is mainly versed in the history of the sixteenth century must, however, if he trespasses on the middle ages, be ready to face prosecution with all the rigour of medieval lore; and this volume cannot escape criticism of its lack of technical knowledge in many details. My excuse for the trespass is that, being engaged on a study of the Tudor constitution, I could not understand it without seeking answers to preliminary problems which had not been solved; and historical curiosity combined with an academic interest in politics to expand an introduction to the constitutional history of the Tudor period into an essay on the place of parliament in the past, the present, and the future of the English state. The last two chapters at least of this volume are not history; but I doubt the logic and the expedience of the contention that it is only the business of those who have not studied the past to discuss the present or the future.

The book is less a history of parliament than a suggestion of the lines upon which it should be written, and rather an indication of the research that is still required than of that which has yet been done. Few of the conclusions here tentatively outlined can be established without prolonged research by many scholars; but happily the prospect of a school of historical research is not so distant as it was. Meanwhile, I have to express my deep obligations to the fellow-workers who have attended the formal and informal

meetings held at University College during the last six years to discuss various problems of historical research, and to whom I owe many suggestions, references, and corrections. A list of acknowledgements would be long and invidious, but I cannot repress a word of thanks to Miss Jeffries Davis, Lecturer in the Sources of English History at University College, whose contribution to the value of those discussions has been crowned by a card-index of references to the materials for English parliamentary history, which is available for all who care to consult it. It is not, of course, complete; and possibly its most fruitful function may be to indicate the need and value of similar registers of historical materials already printed or preserved in British archives.

A. F. POLLARD.

April 23, 1920.

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THE EVOLUTION OF PARLIAMENT

CHAPTER I

THE PLACE OF PARLIAMENT IN HISTORY

In the best-known life of one historian by another there is a passage which combines the views of two writers of genius on the modern value of parliamentary institutions. "He spoke much," writes Froude of Carlyle, "on politics and the character of public men. From the British Parliament he was firmly persuaded that no good could be looked for. A democratic Parliament, from the nature of it, would place persons at the head of affairs increasingly unfit to deal with them. Bad would be followed by worse, and worse by worst, till the very fools themselves would see that the system must end. Lord Wolseley, then Sir Garnet, went with me once to call in Cheyne Row, Carlyle having expressed a wish to see him. He was much struck with Sir Garnet, and talked freely with him on many subjects. He described the House of Commons as 'six hundred talking asses, set to make laws and to administer the concerns of the greatest empire the world had ever seen,' with other uncomplimentary phrases. When he rose to go, he said, 'Well, sir, I am glad to have made your acquaintance, and I wish you well. There is one duty which I hope may be laid upon you before you leave this world—to lock the door of yonder place, and turn them all about their business.'"[1]

[1] Froude, *Carlyle's Life in London*, ii. 446.

Cromwell himself was not infected with his biographer's contempt of parliamentary institutions, and Carlyle represents the Homeric age of historical science. Hero-worship is impatient of constitutional government, and its votaries are unfitted by temperament to measure the value of parliaments. But the critics are not confined to the ranks of archaic admirers of force, and the permanence of the British parliament itself is doubted by advanced students of modern politics English publicists have speculated without horror on the abolition of the house of commons, and Americans have described the sovereignty of parliament as a phantom. "It may well be doubted," writes one, "whether the doctrine of Parliamentary sovereignty, in any form that means much, can long survive the triumph of democracy. . . . When the Referendum really comes, the sovereign Parliament must go. But whether for good or for evil, the Referendum, in principle at least, seems to be coming."[1] To the advocates of the referendum and the believers in the sovereignty of force must be added the bureaucrat and the syndicalist; and the life of parliament might seem to depend upon that mutual antagonism of its enemies which destroys the cumulative force of their attacks. But even extinct monsters have their scientific interest, and if it were true that parliament has run its course of public utility, that fact would make it all the easier to determine its place in history.

It is possible, however, that a re-examination of the various functions which parliament has fulfilled in the past may lead to a less pessimistic view of its future, and that the dissolution which seems so patent to some observers is merely another transformation. If, indeed, we regard parliament as having been a fixed institution and apply to it architectural metaphors like foundations, corner-stones, and so forth, signs of change must need appear to be symptoms of decay. But fortunately for itself parliament has never attained that rigidity, which appeals to the artist in bricks and mortar but strikes the student of life as a proof of death; and has eluded all efforts to stereotype its con-

[1] McIlwain, *The High Court of Parliament*, p. xv.

stitution which, if successful, would have had the effect of encasing a living heart in plaster of Paris. For political institutions that stand the test of time are organisms subsisting upon their adaptability to their environment and ever changing with the conditions of their existence. Parliament is not bound up with any political theory or any transient constitution; it has been the tool of monarchs, of oligarchs, and of democrats; it has been the means of opposition as well as the instrument of government, the preventive of revolution as well as the promoter of reform. It has been, and is still to some extent, a court of law, a council, and a legislature; and its forms, which were used by medieval kings, have been found still more effective by modern ministers. Its elasticity has known no bounds in the past, and we have yet to learn that it has no value for the forces of the future. The faith of men in what can be done by act of parliament is assuredly not on the wane; and the mother of parliaments has seen her progeny spread into every civilized quarter of the globe.

Parliamentary institutions have, in fact, been incomparably the greatest gift of the English people to the civilization of the world. Civilized man has drawn his religious inspirations from the East, his alphabet from Egypt, his algebra from the Moors, his art and literature mainly from Greece, and his laws from Rome. But his political organization he owes mostly to English conceptions, and constitutional systems all over the world are studded with words and phrases which can only be explained by reference to the medieval English parliament. Other nations have had their indigenous representative systems, but they have all been abandoned or profoundly modified under the influence of English ideas; and reichstag and duma, riksdag and storthing, sobranje and meiljiss are none of them the purely native products their names would imply. Here and there the grafting has not been successful, but the failure of parliamentary institutions in semitic and negroid communities is proof, not of the defects of parliaments but of the political incapacity of those who cannot work them

As a rule the political genius of a nation may fairly be judged by the success of its representative system.

And this is a valid criterion because parliament is the only expedient by which any degree of self-government can be combined with the organization of a national state. The cities of ancient Greece and of medieval Italy governed themselves without the assistance of parliaments because they were small enough for direct popular participation in the sovereign functions of administration, discussion, and legislation. But when the ancient city state expanded into the empires of Alexander and Cæsar, self-government disappeared, because representation had not been invented, and multitudinous peoples could not appear in person. It is a small community that can govern itself without representation. Great states can exist without parliaments, but without them their people cannot govern themselves. City states can enjoy popular self-government without representation, but they cannot expand without losing their liberty; and the threadbare theme that a democracy cannot govern an empire only holds good—like other classical gibes at democracy—of popular rule without representation. It is one of the ironies of politics that those, who have derived from the study of ancient history a prejudice against democratic government, should often be so anxious to reproduce, by means of the plebiscite and referendum, that direct and commonly thoughtless popular action which was responsible for the prejudice. For it was by the growth of parliament, which the referendum would undermine, that the incompatibility between *imperium* and *libertas* was removed, the oscillations of popular passion corrected or checked, and the ancient indictment of the schools against democracy rendered obsolete.

Parliament, indeed, has been the means of making the English nation and the English state. It is really co-eval with them both. There was, it is true, an England centuries before there was a parliament, but that England was little more than a geographical expression. It was hardly a nation, still less a state; and Edward I was the first English

king of an English people that could be described as even partially united and conscious of its unity. The unblushing patriotism which discovered in Alfred the Great the founder of Oxford university was not less historical than the crude Teutonism which saw in the Anglo-Saxon period the golden age of English nationality, and pictured before the Norman Conquest a free, self-governing people, combining the vigour of primitive virtue with the perfection of radical principles. Alfred himself was a Saxon king who was hardly made English by the conquest of half the English kingdom of Mercia. The *fyrd* was the people in arms, but the people were tribal folk who fought for the most part against their Anglo-Saxon neighbours; the duty of self-defence was a local and not a national obligation; and, so long as it lasted, the *fyrd* could not be summoned to serve beyond the shire unless it was paid by the king for doing what was not considered the business of the people. Down to the time of Henry II law was not English law, but the law of Wessex, the Mercian law, and the law of the Danes. Politics, too, were local and provincial; the people who lived in England regarded themselves as West Saxons, Mercians, or Northumbrians, and even to-day the older natives of the Isle of Wight speak of immigrants from the adjacent Hampshire as "foreigners." Kings could not make bricks without straw, and the material means for creating a national state were wanting. Roads hardly existed, communications were scanty, and administrative organization was undeveloped. The consciousness of nationality, without which there can be no national state, does not grow out of nothing; it needs substantial nourishment, and its provision was beyond the means of Anglo-Saxon chieftains.

The Norman Conquest, despite the vehement protests of Anglo-Saxon historians, did in a real sense mark the beginning of English history; and it is no mere quibble that reckons the kings of England *post conquestum*. Absolute origins are not, of course, to be found in historical records, and for them we have to go back beyond the conquest

of Britons by Angles and Saxons as well as beyond the conquest of Anglo-Saxons by Danes and Normans; and the sources of English nationality, like those of great rivers, are shrouded in glacial veils. But the English state and the English nation have been moulded on a framework provided by Norman and Angevin rulers. Even English liberties appeared in an alien guise,[1] and there is hardly a word or a phrase in the law and custom of the British constitution that is Anglo-Saxon in origin. To the "liberty of the subject" the Anglo-Saxon tongue has only contributed the article and the preposition; and "vote," "franchise," and "suffrage" are all extraneous terms. Court, council, and parliament, judge and jury, inquest and verdict, alike come from abroad; and the Englishman cannot perform a single civic or legal duty, or exercise a single political function, from parish council to parliament, without using a word or expressing a thought unknown to his Anglo-Saxon forbears. It was this vast importation that made it possible to construct our English state out of the raw material of Anglo-Saxon tribes.

The process was slow and painful enough. The work of the Normans and Angevins was not to introduce feudalism into England, but to organize the feudal forces already at work. This meant simultaneous construction and destruction; for the more feudalism is organized, the more it disappears. Feudalism, it has been said, implies the negation of all that we mean by the state;[2] it involves local and class association, but national dissociation. Villeins were bound to the lord of the manor, but almost cut off from the king of the realm and, what is more important, from the villeins of other lords. There was little in common, because the lord intercepted communications; and this privilege of intercepting communications was the lord's franchise, his "liberty" and his "honour." It varied in

[1] Cf. G. B. Adams, *The Origin of the English Constitution*, p. 3 *n.*: "the thesis of this book is that this English national constitution . . . is a direct outgrowth of the earlier feudal constitution of the State"; Pollock and Maitland, *History of English Law*, 1895, i. 63.

[2] H. W. C. Davis, *Medieval Europe*, p. 93.

degree and extent; sometimes the lord could exclude the king's sheriff, take the royal writs he bore, and carry them out himself; sometimes he could exclude the king's writs altogether. It was one of the points of Magna Carta that the king should hold no communication with a lord's villeins which might turn to the lord's disadvantage; he must neither tallage them nor hear their complaints against their lord; against him they had no *locus standi* in the king's court or before the king's judges. The franchise was a petty kingdom which its lord sought to render independent, and his notion of liberty was irresponsibility in the management of his own domains.

This sectional dissociation was no worse than the Anglo-Saxon parochialism which it replaced, and against it must be set the association enforced by the Norman kings when they insisted upon the liability of every tenant-in-chief to attendance at the king's court and in the king's army. But this form of association tended to accentuate the dissociation of class from class which became stereotyped in the continental systems of estates. In England it was chiefly marked by differentiation in matters of taxation and jurisdiction. There was no national taxation in the twelfth and early thirteenth centuries; each class paid its own peculiar kind of imposition. The military tenants rendered their feudal services and aids and occasionally paid a special tax on land called the danegeld and afterwards the carucage; the merchants paid their customs; and the villeins paid in work or in kind the dues they owed their lords. But the exactions of the period were for the most part of the nature of rent or legal fines and not of taxes; they arose from men's relations with their landlords rather than with their king. Feudal aids were only due from its tenants to the crown, and tallage was owed by villeins to their lords. It was with rent and not with taxes that Magna Carta is concerned, and it represented the greatest and most successful "tenant-right" campaign in English history.[1]

[1] It should be almost superfluous to refer students for this subject to W. S. McKechnie's *Magna Carta* (2nd ed., 1914).

The Great Charter was wrested from John by a momentary coalition of various classes provoked by exceptional tyranny, and its historical importance lies in its anticipation of the means by which common action afterwards checked despotic tendencies. But it required parliament to focus centrifugal forces and perpetuate common activity. Its principal value in the middle ages did not consist in the ability of its members or in the wisdom of their legislation, for parliament produced few able men before the sixteenth century, and its acts were initiated, framed, and enforced by king and council rather than by "estates." Its value was less direct but not less great; it fostered and formed a public opinion, without which there can be no self-government. By its means shire was linked with shire, borough with borough, and class with class; and the dissociation of the feudal system was brought to an end. In the absence of a vernacular literature and of all those means by which nations are to-day made conscious of their identity, the only means of producing a common feeling was by personal contact; and it was the personal intercourse of their representatives in parliament that made the Northumbrian and the West-Saxon realize their common bonds and common aspirations, and led baron, knight, and burgess to merge their social distinctions in common political action. Just as common law was hammered out in the courts at Westminster and transmitted throughout the land by itinerant justices, so a common political sense was evolved from the communion of class and locality in parliaments, and communicated by slow degrees through members to their constituencies. The infiltration was facilitated by the very defects of medieval parliamentary practice. For parliaments, while they sat for only a fortnight or three weeks, were chosen afresh two or three times a year, and members were rarely re-elected; but only residents were chosen, and it followed that far more Englishmen served as members of parliament then than now. In a borough with a small constituency, it might easily happen that almost every constituent had at one time or other been sent to West-

minster. The member would not be an expert politician, but the constituency would have a high average acquaintance with Westminster politics; and in politics the general intelligence of constituencies is as important as the exceptional capacity of representatives. Probably in medieval England it was more essential that a large number of local burgesses should be brought occasionally into touch with the heart of national government, than that a few should become expert, regular, and professional members of parliament.

Parliament has thus been the peculiar means through which the English people achieved their unity and nationality, and that is perhaps the reason why the nation has always excelled in politics. There are various means by which unity has been stamped upon the peoples of the world. In primitive times and backward communities it has been simply a matter of race. Sometimes unity has been achieved through religion; and Mohammedanism has been the most successful in this respect, though for a time it seemed as though the papacy might by means of the catholic religion weld the west of Europe into a unified ecclesiastical state. The Romans impressed unity on their empire by force of arms and the genius of their law. Other peoples have owed their impression of unity to their literature or their art. But in none of these ways did the English people find their national salvation, though the Hundred Years' war and the literature of the ages of Chaucer and Shakespeare powerfully aided the growth of national sentiment. But these stimulants to communion were preceded by parliaments, and it may be doubted whether, without the financial assistance of parliaments, the Hundred Years' war could have been fought at all, and whether, without the impetus of parliaments to common thought, Chaucer would have found a public for which to write.

English nationalism cannot, indeed, be assumed before the reign of Edward I. The cry against aliens was loud in the land under Henry III, but it was raised by men who were hardly more English than the aliens they denounced.

Englishmen would resent an influx of Russians or Germans into the Indian civil service, but their resentment would not be due to their Indian nationality. Magna Carta is claimed as a triumph of English nationalism, and men talk of a national church in the thirteenth century. But the popular claim for Magna Carta would be more convincing, if there could be found a single thirteenth-, fourteenth-, or fifteenth-century version of the charter in the English language; and it would be easier to believe in a national church if its bishops and abbots and friars had been less foreign and if the tongue they used had been that of the flocks they tended. But it is not easy to grasp the meaning of a nationalism attributed to a people without a native literature, a native church, a native government, or even a native opposition; and English nationalism only emerged with parliaments under Edward I.

It is parliament, too, which transforms medieval into modern liberty, and the "franchise" of the feudal baron into universal suffrage. The extent and rapidity of the change that is wrought by parliament in the conception of liberty is strikingly shown by a comparison of Magna Carta with a little-known petition sent up by the commons in 1348. The liberties for which the authors of Magna Carta clamoured had become anathema to the commons four generations later: "whereas," they complain, "liberties have been so lavishly granted by our lord the king, that the whole of this realm almost has been enfranchised—to the great oppression of the people and hindrance of the common law—may it please our lord the king to refrain from such concessions in the future."[1] One man's food may be another's poison, and the baron's liberty consisted in the servitude of his villeins; his franchise was irresponsible dominion over his tenants, and it involved a negation of common law. The more numerous and the wider the franchises, the narrower the scope of the common law and the greater the means of private oppression. The chief claim of Magna Carta is that those who possess these fran-

[1] *Rotuli Parliamentorum*, ii. 166 *b*.

chises shall be exempt from the royal or national interference. Liberties were as great an oppression in 1215 as in 1348, and as stubborn an obstacle to the common law; but in 1215 there was no parliament to voice the common opinion or to interpret the real meaning of Magna Carta. There were more "liberties" in the sense of Magna Carta before parliaments existed than there have been since or are likely to be again; for one of the greatest historical services rendered by parliaments has been to abolish the liberties of the Great Charter, and transform "liberty" from the privilege of the baron into the common inheritance of the English people.

The conversion was not, of course, accomplished by Edward I nor even by the commons under Edward III. But Edward I did something by his *quo warranto* inquiries into the titles, by which the barons claimed to exercise the despotic authority called their liberty; and he did more when he brought his "commons" into the high court of parliament, and provided therein a hearing for suitors who had their constituents' purses to back their petitions. Again, it was their collective action that gave strength to their demands for redress. The timorous individual gained courage in the crowd; and the personal supplication swelled to higher note in the common petitions of parliaments. But political education comes slowly to a people, and it was long before the locally-minded burgesses learnt that popular power depends upon a capacity to sacrifice local aspirations and particular interests in the pursuit of common ends. The will to achieve a common liberty was weaker than the will to grasp a local advantage; and boroughs were only too willing to abandon their part in national politics, if they might thereby escape the expense which representation involved. Parliament might complain of the lavish distribution of liberties, but it lacked the force of public opinion to ensure the observance of its petitions; and to the end of the middle ages, the liberties of the lords remained the curse of the body politic. It was not till Henry VIII, by means of acts of parliament, began to take such "liberties"

into the hands of a national sovereign, that national liberty at last got under weigh.

It had still a stormy voyage before it. The absorption of feudal liberties by the crown gave rise to a monstrous growth in the liberties of kings, and the Stuarts went down in defence of free and independent monarchy. Freedom and independence became a common cry without becoming a common cause. King, lords, commons, and law-courts all demanded liberty; but it was their own, and not other people's liberties, of which they were enamoured, and when the crown was smothered by the Whigs, the two houses of parliament each claimed an irresponsibility as complete but not as divine as that asserted by Charles I. To report their speeches or to publish their votes was an infringement of their rights, and parliamentary privilege was the latest growth of the medieval notion of liberty. But unlike the crown and the barons, parliament was the means of reforming itself; it abandoned its irresponsibility, and transformed its exclusive liberty into its duty to its constituents. If its function has not been to make all things common, it has at least created a common liberty.

Political communism is, indeed, the keynote of parliamentary history, and the house of commons has been the essential factor in the growth of parliament. "Commons" is a form of "communes" or communities; and as early as the fourteenth century, the official handbook to parliaments lays it down that the king can hold a parliament with the "community" of his realm although no bishop, earl, or baron attends, but that without the "community" no parliament can be held, though bishops, earls, and barons, and all their peers are present with the king.[1] To express the common sense of the community has always been the function of English parliaments, and the predominance of the layman has ever appealed to the English mind. The expert has seldom been at home in the atmosphere of parliament, and from first to last its communal organization has for-

[1] *Modus Tenendi Parliamentum* in Stubbs, *Charters*, ed. 1900, p. 512. See below, p. 80.

bidden its separation into "estates." Its description as "three estates" arose in the fifteenth century out of a mistaken French analogy, and the phrase was never a true definition of an English parliament. The whole conception of caste implied in the word was alien to English law and English politics; and every man's place in parliament was determined by tenure and not by status, by writs of summons and not by class distinctions. The "grades" or "estates," of which we read in the fourteenth-century parliaments, were many and not merely three in number, and they were not matters of birth. The judges are called an estate, and so are the clerical proctors; yet the one was composed of royal nominees, and the other of representatives whose birth might be noble, gentle, simple, or base. There was no distinction of caste between the baron who had a special writ and the baron who sat for a shire; both might be barons and both might be knights, and every priest was at least a "lord."[1] So far from the English parliament being a system of three estates, it was the difference between such systems and the English parliament that enabled parliament to survive and grow while every system of estates dwindled away and died. Their division into estates was fatal to their permanence and power; parliament was saved by the community of thought and action which averted social schism and made our English state.

The communion of parliaments led to the estrangement of the church in the fourteenth century and to the victory of parliament over it in the sixteenth. Convocation was not merely composed of clerics; it was also elected by them, and it represented nobody else. The commons represented the nation, except for its clergy. No organized class is long successful in English politics; whenever a class acts as a class in politics, whether clergy or doctors or manual workers, it betrays a lack of political wisdom; and the most prudent as well as the most ambitious claim of the labour party is to represent all those who work for their

[1] "Domine" might be used as an address almost as widely as "Sir" is to-day.

living and not merely those who toil with their hands. For the English people, assisted by parliaments, have laid hold of the Aristotelian maxim that the best judge of a dinner is not the cook but the diner, and the best judge of a performance in music or the drama is not the performer but the public. The issue between church and state was one between expert and layman, and the claim of the politicians who effected the Anglican reformation was that religion should be the affair of the people and not the domain of the priests. Doctrine, they held, could be defined by national authority, prayers should be "common," and the vehicle of religion should be the vernacular tongue; and these things could only be done by acts of parliament. In Scotland the case was different: no Henry II had there created a common law, and no Edward I a house of commons. The Scottish estates were more like the French estates than the English parliament, and the Roman citadel fell before blasts from the trumpets of Knox and his fellow-churchmen. The kirk they established was based on lay as well as ecclesiastical representation, and its general synod was a better exponent of public opinion than the secular Scottish parliament. The union of the English and Scottish parliaments was facilitated by the fact that Scottish national sentiment was reflected in the kirk which retained its autonomy; and Scotland took little stock in parliaments until in the nineteenth century the kirk had suffered disruption and ceased to embody Scots public opinion.

It has been said that the supreme achievement of the Reformation is the modern state,[1] and it is true that the destruction of the medieval liberties of the church paved the way for the "omnicompetence" of parliament. The doctrine of parliamentary infallibility, which emerges under Henry VIII, was seriously adopted even by royalist judges under Charles I.[2] Modern catholics like Lord Acton

[1] Figgis in *Cambridge Modern History*, iii. 736.
[2] *Letters and Papers of Henry VIII*, XX. ii. p. 345; Gardiner's *Documents*, ed. 1889, p. 54.

have regretted the fall of the church on the ground that it is the natural guardian of liberty against the encroachments of the modern state; but where the church retained its liberties, as in France, Spain, Austria, and Italy, the gain to popular freedom was not apparent, and the reason was that the clergy stood, as a rule, for their own and not for other people's liberties. It was jurisdiction, irresponsibility, and power for which they contended against the state; and their failure in England was not fatal to popular liberty because the victorious parliament stood for representation and public opinion. The forces it represented against the church enabled it later on to repress its monarchical allies; and, while monarchy was severely checked in 1688, sovereignty was strengthened and developed. The state has gone on from strength to strength because its parliamentary organization provided for an ever-widening national representation, and government became increasingly the affair of the English people.

The fear, which haunted de Tocqueville in the earlier half of the nineteenth century, that democracy involved weak government, has since given way to alarm at the despotism of the state; and it is clear that the power wielded by modern governments is out of all proportion greater than that of medieval or even Tudor monarchs. Their puny budgets and casual armies rendered their rule little more than a struggle for existence. They could hardly keep peace at home or maintain war abroad because both peace and war were regarded as their affairs and not the affairs of their people, and parliament did not consider itself responsible. It was always the opposition and never the government; and even to-day a prolonged sojourn on benches to the left of the Speaker's chair impairs a party's sense of responsibility. Parties are only restrained from faction by the prospect of having themselves to manage affairs; and that prospect was never before the eyes of a medieval parliament. Supplies had to be wrung from the commons by all sorts of impossible promises, because supplies were regarded as personal gifts to a king and not

as the means of achieving a common purpose. It was only a parliamentary government, responsible to an electorate, that could raise the funds required to foil a Louis XIV or a Napoleon and to create a British empire. Its one great disruption was due to neglect of the truth that the strength of a government depends upon its sense of responsibility to those whom it governs; and the North American colonies were lost by George III because he believed he could tax them against their will. The omnicompetence of the modern state has grown out of the comprehensiveness of its representative parliament, and every self-conscious political element excluded from the franchise is a source of weakness to the government.

Parliament, however, could not comprehend all the self-conscious communities within the British empire, and the responsibility of governing the overseas dominions of the crown had to be delegated to other parliaments which could react more easily and quickly to their varying demands. But the habit of self-government made England readier to admit the claims of other peoples. Imperial Rome sacrificed her provinces rather than nurse them into daughter-states; the British empire has saved its unity by multiplying its representative systems, and the mother of parliaments not only made the English state, but reproduced it in every quarter of the globe. On the lines laid down in medieval English parliaments scores of legislatures are working in the world to-day, solving similar problems of localism, racialism, and class prejudice. Parliamentary institutions have softened the animosities of French and British in North America, and of British and Dutch in South Africa, and brought inveterate enemies on the field of battle into common action in the cabinet. The force of argument has supplanted the argument of force, and in discussion and debate a common sense and a public opinion have hammered out a basis of unity and supplied the foundations of national growth. Each dominion has repeated the experience of the mother country, and passed through the various phases of constitutional evolution, from crown administration to

representative institutions, and from representative to responsible government. But the lessons of history were not forgotten; and results which took the mother country centuries of painful labour to achieve, were secured by the colonies within a generation and sometimes within a decade.

The very completeness of its success has suggested the thought that the work of parliament has been done. It has created the nation and educated it in self-government; democracy, we are told, can now legislate for itself, and the middlemen of parliament are superfluous. Having subjected the expert to common sense, it should itself submit to the referendum, and abandon its sovereign rights to the man in the street. If lay judgement is valid, why defer to professional politicians? The question raises a critical issue for parliament, whose future depends on the answer. In truth there never was greater need for political experts, and democracy has just as much use for the specialist as any other political system. He is not the final arbiter, but his advice is needed none the less. The member of parliament is like the doctor of physic; the patient is foolish who tries to dispense his own prescriptions, but he can choose his medical man and even reject his advice, occasionally with impunity. The responsibility for the adoption or refusal of expert advice rests with the patient because it is he who suffers. It is the same in political matters; the community suffers from foolish advice and benefits from wise counsel; it should therefore choose its advisers, and judge them by their works. If they are good, confidence will continue; if they are bad, a change of advice will be sought. But the electors can no more do the work of parliament than the patient can do his doctor's. The people are fairly good judges of legislation after experience of its effects; but they are very bad judges of programmes. For to forecast the effect of legislation requires the deepest political insight, and is the rarest of gifts. It may be argued that the people would learn to legislate wisely from the effects of their own legislation: they might also learn the properties of the

whole *materia medica* from the effects of their own prescriptions, but the casualties in the process of enlightenment might be fatal to the community. It is more prudent to employ the expert and hold him responsible for his advice.

We talk, indeed, of democracy, but seldom pause to define it, except in magnificent phrases. Abraham Lincoln spoke of "government of the people for the people by the people"; but the people have never been able to govern themselves except in the sense of choosing between two or more sets of governors and two or more party-programmes. When it comes to matters of practice, the nearer we get to direct popular rule, the slighter the power we leave to the people. A parish council is allowed to do little because it is a real parochial democracy; a county council can do more because it is further removed from the man in the street; but even it is subject to control from a bureaucracy at Whitehall. No one would dream of entrusting the determination of foreign policy, of educational problems, or questions of public health or finance to a referendum, because not one in a hundred of those who would vote could understand the issues at stake. The democracy that is practised, as distinct from the democracy that is preached, in England is a matter of complex and careful gradation embodying other than democratic principles. The prime minister is more of a monarch than many kings, and the cabinet has features of more than Venetian oligarchy. It is only by means of parliament that these undemocratic factors are fused in a popular government, and the secrecy, despatch, and efficiency essential to the administration of an empire are combined with the rule of public opinion. At present parliament holds the political field. It is liable, as it has ever been, to legitimate criticism, and it needs reform; but no proposal for its abolition proceeds from any sounder premiss than unphilosophic impatience with the imperfections of human institutions, or than thoughtless faith in the wisdom of the mob. By means of parliamentary government, adapting itself in time to chang-

ing conditions, the modern state will have to solve its problems for ages yet to come; and there is a practical as well as an academic purpose to be served by an inquiry into the origin, functions, and evolution of the organ of the English people.

CHAPTER II

THE HIGH COURT OF PARLIAMENT

FOUR ideas, at least, with respect to the foundations and functions of English parliaments have become firmly rooted in the popular mind. One is that their principal object has ever been the making of laws; another is that hereditary peerage and popular representation were indispensable elements in their original constitution; a third that they have always consisted of two houses; and a fourth that they were based on three estates. Like all conceptions that have been firmly grasped by the multitude, these impressions about the history of parliament are hardly less false than true; and it is the purport of these pages to show cause for thinking that parliaments in their infancy were much that parliament to-day is not, and little that it is; that legislation was not the original purpose of their being; that they existed before they contained any representative elements; that there was a time when, if parliaments comprehended a peerage at all, that peerage was not in parliament by hereditary or any other right than royal grace; that parliament was at first a single chamber; that there was no "house" of lords until after the close of the middle ages; that the "house" of commons was not an original part of parliament, but yet is older than the "house" of lords; and that the notion of three estates — so far from being the fundamental principle upon which parliaments were built—was borrowed from abroad and hesitatingly applied in the third century of English parliamentary history to an institution to which it was foreign in spirit and in practice.

Most of the common impressions of parliament are, indeed, irreconcileable with the correct designation of it

placed at the head of this chapter. The words are familiar enough to those who know their book of common prayer; but words have become so cheap that five are often wasted where one would suffice, and four out of these five words are regarded as merely ornamental detail added to "parliament" for the sake of magniloquence or to improve the rhythm of the petitions in which they occur. Why the legislature should be called a high court is a question which few of those, who invoke divine direction for its consultations, pause to ask or seek to answer. The most picturesque method of attempting to solve the riddle would be to visit that gilded ruin of the great council chamber of parliament[1] which we call the house of lords, and to trace the processes by which the various objects meeting our eye have come to be where and what they are or pretend to be. The house of lords is, however, still restricted to purposes other, though not necessarily more useful, than historical exposition; and, relying upon those powers of visualization which every reader is bound to cultivate, we must undertake in imagination a sort of geological and archæological survey of that chamber, with the hope that in our excavations we may light upon a fossil here and there which may enable us to reconstruct an earlier, and in this case less glacial, period of its history.

The first object to arrest our attention will be the throne, a symbolic and material reminder of the facts that the king is legally present in every court throughout the British empire, and that every act of parliament is technically an act of the king in parliament, just as every order in council is an order of the king in council. The physical appearances of the king in parliament have, it is true, grown so rare and become so purely ceremonial that we may pardon our own forgetfulness of the incongruity between our theory of the house of lords as a chamber consisting of peers on the one hand, and on the other the actual presence of the king, who has no peer in his own dominions and yet is the only person—except the lord chancellor—entitled to sit

[1] See below, pp. 72–3, 98, 291, 300.

in the house of lords without a summons. Nevertheless, it is not long since the sovereign was personally considered so essential to parliament that a demise of the crown instantaneously put an end to a parliament and rendered its further proceedings an empty form. Earlier still, in the reign of Edward III, and again in that of Henry VI, it was a matter of anxious debate in parliament and in council whether parliament could transact any business whatsoever without the corporal presence of the king. Clearly it required more than peers to make a house of lords.

Not less interesting, from our present point of view, than the presence of the king upon his throne, is the more frequent presence of members of the house of commons who are privy councillors upon its steps. But their mere presence in the house of lords, at the opening of parliament or during the progress of an important debate among the peers, is not so significant as the fact that they cannot be excluded. When a peer listens from the peers' gallery to a debate in the house of commons, he is there on sufferance; and any member can, by "spying strangers," have the peers excluded. That, we shall find, is a relic of the time when the house of commons was no part of parliament, but a more or less secret debating assembly, of the proceedings of which parliament had no cognizance until they were reported to it by the Speaker. The right of privy councillors to be present at the lords' debates illustrates the fact that the house of lords is the ancient parliament chamber of a great council which comprised other elements than peers. We are told, it is true, that the throne is not technically in the house of lords; but assuredly it is in parliament, and we are deceiving ourselves by this explanation unless we realize that within the parliament chamber there has been drawn, first an invisible line, and then a visible rail to give substance to the theory, separating the peers from some newer, but also from some older and more essential, elements of parliament.

Another object which we are told is not technically in the house of lords is the woolsack, although an act of 1539

declares specifically that it is "in the midst of the parliament chamber."[1] On it sits the lord chancellor whose presence and whose functions are as incongruous as the king's with our current notions about the house of lords. It is true that since the reign of Queen Anne the lord chancellor has always been made a peer if not already one before his appointment. But this practice has been simply one of giving him a coat of hereditary paint to make him look like his surroundings. Historically, there was no reason why the lord chancellor should be a peer; he requires no writ of summons, and, in fact, as lord chancellor, he receives no summons. It was he who summoned every one else either by special or by general writs issued out of chancery; he had no need to summon himself; he was there *ex officio*. Every schoolboy knows that Sir Thomas More was chancellor and that he never was a peer, although as chancellor he presided over the house of lords, and took the leading part in its proceedings. The same functions were performed throughout Elizabeth's reign by Sir Nicholas Bacon, Sir Thomas Bromley, Sir Christopher Hatton, Sir John Puckering and Sir Thomas Egerton, who were no more peers than Sir Thomas More; and down to 1705 the lord chancellor or lord keeper, whose power had been declared equivalent to the lord chancellor's by an act of 1559, was as often as not a commoner. In the earliest periods of parliamentary history the lord chancellor had usually been a bishop; but in 1340 Sir Robert Bourchier was appointed, who was neither a bishop nor a baron,[2] and he had successors in Sir Robert Parning, Robert de Sadington, John de Ufford, Sir Robert Thorpe, Sir John Knyvett and others, who performed the chancellor's functions without being summoned, as peers or in any other capacity, to parliament. Down to the present day a new lord chancellor takes his seat on the woolsack before he becomes a peer.

These chancellors sat in the high court of parliament

[1] 31 Hen. VIII, c. 10.
[2] Pike, *Constitutional History of the House of Lords*, p. 353; cf. Elsynge, *Modus*, pp. 138–9, 152–3.

because they were judges or councillors; and other judges had their places beside them. A judge is still addressed as "my lord" because the high court of justice in which he sits is, in spite of its removal from Westminster Palace to the Strand, an historical part of the high court of parliament, of which the judges were lords. They still are summoned by special writ to the house of lords, as are the law officers of the crown and masters in chancery, and as were the serjeants-at-law until the abolition of that order of the coif. It is true that for many years these writs of summons to king's councillors learned in the law have not been obeyed, but their issue to all the legal luminaries of the country proves that the constitutional theory of the second chamber is different from the modern practice and conceptions of the house of lords. Finally, a small detail of parliamentary usage will serve to emphasize the point: in both houses of parliament, an examination of the *Journals* in the sixteenth century will show that the word used to indicate the passing of a bill is *judicium*; every act of either house, public or private, was in fact a judgement, because a parliament was a court. Indeed, had it not been a court, it might never have become a legislature; for, as we shall see, legislation is not a natural product of juvenile states, and it only develops slowly out of judicial functions.

We can now approach, with some hope of understanding its purport, the earliest definition of an English parliament. It occurs in the work of Fleta, a pseudonymous author who wrote in the time of Edward I or Edward II; and it runs as follows: *habet enim rex curiam suam in consilio suo in parliamentis suis.*[1] To the modern eye with its prejudice in favour of the constitutional separation of powers, this description appears to involve a strange confusion of functions. In "curia" we have the judicature, in "consilium" the executive, and in "parliamenta" the legislature; and they are all here rolled into one. In substance this is true,

[1] *Fleta*, lib. ii. c. 2; Maitland, *Memoranda de Parliamento* (Rolls Ser.), p. lxxxi; Pollock and Maitland, i. 179 *n.*; Baldwin, *King's Council*, p. 308.

though the point of view is misleading. It is not that three constitutional functions have been merged in one; it is that the comprehensive functions of a medieval parliament have not yet been specialized and differentiated; and we are dealing with a sort of constitutional protoplasm out of which will in time be evolved the various councils of the crown, the houses of parliament, and the courts of law. There are dangers enough in applying the analogies of physical science to the development of political institutions. Nevertheless historical study has to accomplish an intellectual revolution comparable to that achieved by biologists when they broke down the idea of the fixity of species and substituted that of evolution. The separation of powers, upon which many modern constitutions have been established as though it was an immutable principle of politics, only represents a stage in constitutional growth; and we cannot understand English constitutional history, with its struggles between crown, parliament, and courts of law, unless we realize that all are descended from a single ancestor and are disputing over their respective shares in an inheritance which all had once enjoyed in common.

Further instruction can be derived from Fleta's statement by a closer examination of its terms. What does he mean by *curia?* what was the *curia regis* of the twelfth and thirteenth centuries? Perhaps we may understand these questions better by asking a third, what is *the* court to-day? Of course there are courts of many kinds; but *the* court *par excellence*, the court which requires no adjective, is the court which has its activity recorded under that simple heading in the court circular. It has no fixed habitation, no definite functions, no elaborate organization, no indispensable member except the king. It is not a building, it is not even a place; it exists wherever the king officially is or is deemed to be; it is the royal presence, actual or implied. The view is at least tenable that the *curia regis* meant nothing more; and one might guess that a medieval clerk would translate our phrases "the crown in council" and "the crown in parliament," not by *rex in concilio* and *rex in*

parliamento, but by *curia regis in concilio* and *curia regis in parliamento*. We actually have the phrases *curia regis ad scaccarium*, *curia regis in cancellaria*, and *curia regis de banco*; and none of them can imply much more than the theoretical presence of the king in these courts by means of specialized representatives. *Curia regis* is the medieval latin for what we call the Crown.

This theoretical presence pervades every court throughout the British empire at the present time, and it is an attribute of the modern sovereignty of the crown that no one can hold a court except its representatives and delegates. Feudal theory and practice, however, permitted franchises which enabled many a baron to hold courts of his own. But the same vagueness attached to the meaning of *curia*, whether it was a baron's or a king's. It simply implied a presence and commonly it was the vicarious presence of a steward. We look in vain for any definite organization of the original *curia regis*; it kept no rolls until Henry II had made it a court of law,[1] and no list of members or record of proceedings has been discovered. We have to fall back upon a nebular hypothesis, but in time this subtile presence will take a definite form, or rather many definite forms, and our constitutional system will, by a process of differentiation and consolidation, come to resemble our solar system and comprise a number of planets, deriving their vital energy from *le roi soleil*, with orbits and circuits of their own, sustained by the central power of sovereignty. Nothing, indeed, seems to be a *curia*, unless this individual presence is implicit; and if the term was applied to the courts of the franchises and of the shires, it was because the franchise came from the crown, and the king was as much present in the persons of his sheriffs in the shire courts as he is in all our courts to-day. The courts christian implied a jurisdiction, which came also from above; and a court is not a popular institution.[2]

[1] The *rotuli curiae regis*, which exist from 5 Richard I to 56 Henry III, consist of records of the still undifferentiated king's bench and common pleas. From 1 Edward I they are divided into *coram rege* and *de banco* rolls.

[2] *Curia* seems to be less readily applied to the shire than to the hundred-courts, perhaps because the latter were oftener in private hands.

No one is therefore indispensable to a court except its lord and such of his officials as are required to transact its business. The lord's men owe suit at his court and are liable to be summoned; but they have no grievance and no remedy if he dispenses with their presence. They cannot, indeed, be tried except in his court; but that privilege does not give the individual vassal any right to participate in the trial of his peers. The presence of a single peer, when the French king's court tried a peer, was held sufficient to give the court jurisdiction, and a similar rule obtained in England when a peer was tried in the court of the lord high steward; the peers were there as a jury to establish the facts and not to give sentence.[1] Their rights were subject to the same limitations as the Englishman's right to trial by jury to-day. He cannot be condemned without trial by jury, but he has no right to be summoned to serve on any particular jury, or indeed on any jury at all. His service is a matter of duty and obligation, a liability but not a right; and this general principle pervaded the *curia regis* and its derivative institutions.[2] The baron's notion of liberty was not that he had a right to attend the *curia regis* and interfere in the king's affairs, but that the king had no right to invade the courts of his barons and prevent them from doing what they thought fit with their own. They only valued attendance as a means of checking a king who transgressed their franchises, and Magna Carta was designed to secure the local independence of barons rather than the national responsibility of kings. The king, when he holds his court, is not therefore bound to summon any particular persons to assist him; and the phrase *curia regis* merely implies the king's official attendance for certain important causes, mainly judicial in character.

The king's council is perhaps by Fleta's time a more

[1] Luchaire, *Institutions Françaises*, p. 561; Vernon-Harcourt, *His Grace the Steward and Trial by Peers*, p. 302.

[2] The writ of summons to parliament is a *mandamus*; cf. Elsynge, *Modus*, p. 19, "next to the title is considerable the form of the *mandamus*, how it is to the lords spiritual, and how to the lords temporal and the judges and others of the king's learned council."

definite organization; but this definiteness has probably been exaggerated, and it is not at all clear whether Edward I had one, two, or three different kinds of council. It has been usual to assume at least a plurality of councils; but Maitland confessed his inability to discover more than one.[1] The subject is obscured by the absence of both the definite and indefinite articles from the Latin language, and by the indifference with which medieval clerks and chroniclers wrote *concilium* or *consilium*. Attempts have been made to distinguish the two, but without much success; and we may usefully bear in mind the warnings that while English medieval clerks wrote in Latin, they generally thought in French,[2] and that, if we wish to interpret aright their Latin words, we must ascertain the French equivalent. Now the French have only one word, *conseil*, for the Latin *concilium* and *consilium*, and for our "council" and "counsel"; and it is by no means improbable that where we see "council," the medieval scribe was only thinking of "counsel." When the draughtsman of Magna Carta says that extraordinary aids are not to be levied *sine communi consilio*, and that *negotium . . procedat secundum consilium eorum qui præsentes fuerint*, it is clear that by *consilium* he means "counsel"; and it seems rash to assume that, when he goes on to prescribe the machinery *ad habendum commune consilium*, he means "for the purpose of holding a common council," and not "for the purpose of obtaining the common counsel" or consent.[3] The common council may perhaps be eliminated from the list of Edward I's advisory bodies.

Nor is it easy to adduce contemporary and official evidence for the existence of a *magnum concilium* in Edward I's reign, and it is tempting to take shelter behind Maitland's authority, and assume the singleness of Edward's councils. Nevertheless a *magnum concilium* had made itself painfully evident to Henry III between the Provisions of Oxford and the battle of Evesham. It had, indeed, stepped into

[1] *Memoranda de Parliamento*, Rolls Ser. Pref., p. lxxxviii.
[2] Prof. Tait in *English Hist. Rev.*, xxvii. 720–8.
[3] Moreover, *tenere* and not *habere* is the proper word for "holding" a court.

the shoes of a "mycel-gemot" in the time of William the Conqueror; and it is clear that, while there may have been only one council, it was quite possible to give it a varying constitutional complexion and personal composition. The council dear to Edward I was no doubt a royal council without any other adjective, a council dependent upon the king and representing only the monarchical principle. But a council contemplated by the barons under a weak and obstinate sovereign would be rather a *magnum concilium*, a king's council "afforced" by a number of magnates, representing the barons, and embodying their alternative to monarchical government. At least it is certain that while we can find little about a *magnum concilium* under Edward I, we can read a great deal about it under Henry III and Edward II. An incompetent king generally means an incompetent council; and when the king's council is incompetent, it has, like an inadequate jury, to be "afforced." [1]

The council, if there was only one, was obviously an elastic institution, as vague in its composition and as indefinite in its rules of procedure as was the cabinet in the first quarter of the eighteenth century. Like most important English institutions it proceeded from the crown, but was not created. As the cabinet was merely a meeting of "the king's servants," the council was merely a meeting of the king's counsellors; and there were no fixed rules determining who these servants and these counsellors should be. No one, whatever his baronial or episcopal rank, had any inherent right to be a counsellor of the king. At least, this is the theory of the council under Edward I. Doubtless that royal theory was not the conception which underlay the barons' attempts to make an instrument of government out of a *magnum concilium*; but it passes the wit of man to construct a logical basis for a *magnum concilium* like that indicated in the Provisions of Oxford. William I's *magnum concilium*,

[1] This chapter was written early in 1913. Since then Prof. Baldwin's *King's Council* has greatly strengthened the case against the existence of a multiplicity of councils.

which met on Salisbury Plain, is supposed to have comprised all the tenants-in-chief of the crown. But whether a vast and tumultuous council, organized on this tenurial basis, ever met again is doubtful. Magna Carta says nothing about a *magnum concilium* or its rights; if its *consilium* is a council at all, it is a council to which only the greater tenants-in-chief were to receive a personal summons; and this differentiation of summons would enable the crown to discriminate more or less at will between the holders of a common tenurial qualification. The inability of the barons to formulate an alternative constitutional principle in 1258 reduced them to the crude expedient of simply naming the individuals who were to afforce the council and control the king. Their own leader, Simon de Montfort, was the first to discern the weakness of this scheme, and to set the example of extending the franchise in order to break down an oligarchical opposition. The baronial "afforcers" might themselves be afforced by lesser barons, knights, and burghers. Simon's parliament can hardly have been designed for any other object than the curbing of the *magnum concilium;* and Edward I had similar grounds for making parliament a representative institution. The *magnum concilium* might be swamped in parliament, and the king's council be thus relieved of its independent magnates.

In any case, the council in Edward's reign is freed from its great baronial incubus. In 1305 there are barons, prelates, and earls who are not members of the council, while judges and plain *magistri* are; nearly half the council is, in fact, composed of these non-baronial elements.[1] By the end of Edward I's reign the only council, of which there is any trace, is a royal and royalist body sworn to advise the king truly and loyally, to disclose his counsel to no one, to maintain the rights of the crown, to inform the king

[1] Maitland, *Memoranda*, pp. lxxxviii, cvi. In 1307, when Edward desired the presence of two bishops on the council, they had to be specially sworn. One was John Salmon, who had been bishop of Norwich since 1299; and the other, Robert Baldock, "quem rex vult esse de consilio regis," had been bishop of London since 1304 (*Rotuli Parliamentorum*, i. 218).

of all infringements of his prerogative, to be no respecters of persons, to reveal to him any ties incompatible with these duties, and to contract none in the future without his consent.

This council consisted apparently of some seventy members. It included the archbishop of Canterbury, the chancellor, the treasurer, five earls, four bishops, seventeen barons, and eight royal officials; there were also twenty judges, two deans, three archdeacons, one canon, one notary of the apostolic see, and six who are simply described as *magistri*, and probably transacted the secretarial work, political, diplomatic, and legal, of the crown. It was too large a body for administrative routine, and there is no reason to suppose that the seventy often sat together. Normally they would be dispersed for divers duties and scattered in all the quarters of Edward's dominions. Earls had their counties, barons their franchises, bishops their sees to consider; even when employed on the royal business they would be in Scotland, or Wales, or across the Channel on military, diplomatic, or administrative affairs rather than sitting in council at Westminster. Judges would often be on eyre, or busy in courts that were being rapidly differentiated from the council.

On occasions, however, which were at first spasmodic but tended to grow regular and solemn, the king would wish to gather all his advisers together, to hold his court in his council; and these full conclaves of his council are his "parliaments." The earliest form of parliament is a parley of the council; and the germ of these parleys may be traced in the joint sessions of the barons of the exchequer and justices of the two benches which Edward I instituted in 1284 to deal with doubts which might arise with regard to the interpretation of the charters.[1] "In the great court of parliament," writes Sir Matthew Hale in the reign of Charles II,[2] "at least the figure and model of the *consilium regis* and the persons whereof it consisted, are to this day

[1] *Rot. Parl.*, i. 225.
[2] *Jurisdiction of the Lords' House*, p. 58.

preserved in the lords' house in parliament." This still remains true in parts; we have never completely divorced the king in council from the king in parliament, the executive from the legislature. It is because the king's council is embedded in his parliament that the king's throne is in the house of lords, that the chancellor is present *ex officio*, that judges, law officers of the crown, and secretaries of state sit on the woolsacks as late as the sixteenth century, and that the act of 1539 prescribes places for the council in the house of lords, whether they are peers or not.

We must not, however, when vagueness attaches to *curia* and *concilium*, look for definiteness in the use of *parliamentum*. While Fleta speaks of *consilium* in the singular, he speaks of *parliamenta* in the plural. Councils had ceased to be occasional assemblies, and had become a habit. Parliaments are still in the occasional stage of development in which the plural is more appropriate than the singular because there is no continuity between one parliament and another, and each may have its own individual constitution. The word has been traced as far back as the reign of Henry II.[1] It was certainly used in France in 1239,[2] by Matthew Paris about 1246, in

[1] The earliest instance I have found of the use of the word occurs in the phrase *en sun plenier parlement* of Jordan Fantosme, who wrote towards the end of Henry II's reign (*Chronicles of Stephen, Henry II, and Richard I*, Rolls Ser., iii. 226). Bishop Stubbs uses it, inadvertently I think, of an assembly held at Gaitington in 1189, but it does not occur in the authorities he cites (*Introductions to the Rolls Series*, ed. Hassall, p. 407). In 1244 Alexander II of Scotland was granted a safe-conduct "in coming to meet the king or his council in Northumberland . . . and so long as the parliament there shall last," and on August 15 following the sheriff of Northumberland was ordered to pay various sums for crops trodden down on account of "the parliament" held between the king and the king of Scotland (Bain, *Cal. of Docs. relating to Scotland*, i. Nos. 1647, 1651–2, 1658; Henry III was represented at this "parliament" by Richard, Earl of Cornwall). Here *parliamentum* means no more than a parley; and in this sense the word was used as late as the sixteenth century. In 1539 it is applied to the meeting between Charles V and Francis I (*L. and P.*, XIV. ii. 649), and in 1542 to one between Charles V and the Pope (*ibid.*, xvii. 1103; *State Papers*, ix. 219). Any kind of consultation might be called a parliament: according to Sir Robert Cotton abbots held their parliaments (*Cottoni Posthuma*, p. 44); so did the Inns of Court, and the Stannary Court (Cowell, *Law Dictionary*, ed. 1727 s.v. "Parliament"; *Trans. Devon. Association*, xi. 302; 4 Henry VIII c. 8).

[2] Luchaire, *Institutions Françaises*, p. 562.

the Provisions of Oxford of 1258, and officially from 1275 onwards.[1] But its meaning had not crystallized into its modern sense; and the difference between the English *parliament*, the French *parlement*, and the Italian *parlamento*[2] indicates the vagueness of an original conception which could specialize in such various directions. It is clear that it implied no sort of representation, because representation was never a feature of the French *parlement* or the Italian *parlamento;* and even in England the word is used before burgesses or knights of the shire had been summoned to meet the council at Westminster. As late as 1305 an assembly can still be not only a parliament but a "full" parliament after every one—earls, bishops, barons, as well as knights of the shire and burgesses—except members of the council has been dismissed. "Full" may, indeed, be one of those mistranslations of Latin due to forgetfulness of the fact that the Latin word is itself a translation from the French. *In pleno parliamento* stands for *en plein parlement;* but when a Frenchman says *en plein air*, he means in the *open* air, and when the famous Star Chamber act of 1487 prescribes that amercements shall be assessed "in plain sessions," it means in open sessions; indeed, they are called "open sessions" in another act of Henry VII.[3] A full parliament or a full county court may be only an open parliament or court, and may imply the publicity of its proceedings rather than the amplitude of its composition.

However that may be, the application of the phrase *plenum parliamentum* to an assembly consisting solely of councillors suggest that a session of the king's council is at first not merely, as Maitland has said, the core of every

[1] See below, p. 48.

[2] "The sitting Signoria had the power of summoning a Parlamento, or gathering of the whole resident population of Florence." (Armstrong, *Lorenzo de Medici*, p. 29.)

[3] 19 Hen. VII, c. 14. See my note in *Engl. Hist. Rev.*, xxx. 660–2. This phrase is constantly used in the "Rolls" of the purely legal sessions, and has no reference whatever to the presence of specially summoned barons or generally summoned representatives. Cf. *Rot. Parl.*, i. 19*b*, 32*b*. In *Rot. Parl.*, i. 179 we have "in pleno scaccario." Moreover, when fullness is meant we have *pleinière parlement* (*Rot. Parl.*, ii. 232 *b*) which corresponds to the French *cour pleinière*. Cf. Selden, *Judicature*, p. 105.

parliament, but the whole parliament, and that the addition of earls, prelates, barons and popular representatives, while it added to the taxing powers of the assembly, added nothing to the judicial and legislative authority wielded by the council in parliament; and it has often been remarked that the great legislative enactments of Edward I were not even promulgated in a representative assembly. Nor did this legislative capacity of the king's "council learned in the law" cease in the thirteenth or fourteenth century. It is true that enactments were to an increasing extent submitted to the representative body for ratification; but as late as the sixteenth century the year books of Henry VII's reign show that the main principles of his legislation were formulated by the judges in common session before submission to either "house" of parliament;[1] and in Henry VIII's reign it was the custom of the lords in parliament to secure copies of bills introduced in the house of commons and take the opinion of the judges upon them before they were sent up from the lower house.[2] "Do not gloss the statute," remarked the chief justice to counsel in 1305. "We understand it better than you, for we made it."[3]

Parliament, therefore, in its judicial and legislative aspect, seems to be at first simply a talk or parley of the council in full session. Soon, of course, it comes to be used of parleys between the king in council and other constitutional elements. By the Provisions of Oxford twelve elected barons are to meet the king's council at three parliaments a year. Simon de Montfort "afforces" the elected barons with elected knights of the shire and burgesses; and the growing financial needs of the crown promoted frequent recourse to these representative elements which alone could produce an adequate financial supply. But this financial business was not the original nor the most frequent cause of parliaments;

[1] Cf. Vinogradoff, "Const. Hist. and the Year Books" in *Law Quarterly Rev.*, July 1913.

[2] *Letters and Papers, Henry VIII*, XII i. 901 [39, 40]; *English Hist. Rev.*, v. 568.

[3] *Year Books* 33–5 Edward I (Rolls Ser.), p. 82; McIlwain, *High Court of Parliament*, p. 325; Baldwin, p. 314.

and a perusal of the earliest "rolls of parliament" reveals activities of a different and comprehensive character. Nothing, indeed, is more striking than the multifarious nature of the business there recorded. Page after page reads exactly like the register of the privy council of the sixteenth century;[1] there are minute details of the provision to be made for the wars in Wales or on the Scottish borders, for Edward III's campaigns in France, for the regulation of prices, and for the administration of justice.[2] The records deal, in fact, with the doings of a body which is at once executive, judicial, and legislative; and the presence of the council in the parliament is patent in its rolls.

Mainly, however, the business of Edward I's parliaments is to deal out justice. The title-page of each of the printed volumes of the *Rotuli Parliamentorum* indicates its contents as consisting mostly of *petitiones et placita;* the *memoranda de parliamento,* which will ultimately expand into Lords' and Commons' Journals, when the *petitiones* have been for the most part referred to other courts and the *placita* heard elsewhere, occupy but little space. It is not until late in Edward III's reign that we get a regular series of *rotuli parliamentorum;* and some of the contents of the printed "Rolls of Parliaments" are suspiciously like the *coram rege* rolls of the king's bench which had hardly in Edward I's reign been differentiated from the king's council. The purpose of parliaments is judicial: "whereas" runs an ordinance of the Lords Ordainers in 1311,[3] "many folk are delayed in the king's court because the defendants allege that the plaintiffs ought not to be answered in the absence of the king, and many also are wronged by the ministers of the king, which wrongs they cannot get redressed without common parliament,[4] we ordain that the king hold a parlia-

[1] There are half a dozen entries of this character on the first page of the first volume of the printed *Rotuli Parliamentorum.*

[2] *Rotuli Parliamentorum,* i. 295, 350–1, ii. 108–11, 114–16.

[3] *Ibid.,* i. 285 (29).

[4] "Sans commune parlement" has fortunately not been used to prove the existence of a "Common Parliament," like a Common Council, distinct from other assemblies. The phrase clearly indicates the nature of the parliaments.

ment once a year, or twice if need be, and that in a convenient place. And in the same parliaments shall pleas that have been delayed and pleas about which the judges differ be recorded and determined, and in the same way the bills which shall have been handed into parliament." This ordinance was made in answer to a complaint that the commons, who came to parliaments to seek redress for grievances which could not be remedied by common law or by any other way than special process, found no one to receive their petitions as they had done in the reign of Edward I.[1] Primarily a parliament is a high court of justice.

In this sense the origin of parliaments must be traced back to Henry II rather than to Simon de Montfort or Edward I. If Henry had not made the king's court the matrix of England's common law, neither Simon nor Edward could have made it the matrix of England's common politics; for a foundation of common law was indispensable to a house of common politics. Henry had made the courts, held in his palace at Westminster, the common resort for all his subjects above the rank of villeins.[2] By inviting and attracting thereto men from all quarters of England, he had given them a common framework for their ideas of law and liberty. He had made escape from local trammels and recourse to a national fount of ideas a habit with his people. Even during the troublesome reign of Henry III, the king's court increased the number of forms of writ or judicial process from sixty to over four hundred and fifty;[3] and every new process was a fresh nerve developed between the monarchy and its subjects, a fresh means of linking the brain with the body of the community.

That the main function of Edward I's parliaments is to continue and expand the work of Henry II's *curia regis* will appear from the briefest indication of their procedure. The first step towards the holding of a parliament, after its

[1] *Rotuli Parliamentorum*, i. 444.
[2] "Le paleys soleit le plus frank leu d'Engleterre" (*ibid.*, i. 155).
[3] Maitland, *Collected Papers*, ii. 155; cf. *ibid.*, ii. 476.

summons had been decided, the writs issued, and the representatives, if any, elected, was to make public proclamation in the great hall of Westminster Palace (for Westminster Hall was the "aula" in which the king, like every feudal lord, held his court), in the chancery, in the court of common pleas, in the exchequer, in the guildhall, and in Westcheap that all who wished to present petitions at the approaching parliament should hand them in by a certain date.[1] "Thereupon," we are told by William de Ayremynne, the clerk of chancery appointed by Edward II to keep the *memoranda* of the parliament of Lincoln in January 1316, "the chancellor, the treasurer, and the justices of either bench were ordered to draw up in writing a brief statement of the suits (*negotia*) pending before them (*in suis placeis*) which could not be determined out of parliament, and refer them to parliament so that right might be done therein."[2] Receivers and triers of petitions were next appointed. The receivers were merely clerks in chancery; the triers were more important persons, at first mainly judges, afterwards prelates, earls, and barons. Their functions have not been precisely ascertained. Sometimes they were called "hearers" of petitions, and their commission authorized them to "determine" as well as to "hear"; but whether a hearing and determination by them *in* parliament amounted to a hearing and determination *by* parliament is a matter of doubt.[3] It is well, perhaps, to remember that parliament is not yet an institution or a body, but only a "parley," that *parliamentum* and *colloquium* are interchangeable terms, and that while the king in his council in parley may

[1] *Memoranda de Parliamento*, p. lvii.; *Rot. Parl.*, i. 182.

[2] *Rot. Parl.*, i. 350.

[3] McIlwain, *The High Court of Parliament*, pp. 198–202. The relation of the "auditores" to the council is also obscure. In 1314 we read of "responsiones petitionum Angliæ per auditores earundem factæ in parliamento" as though the "auditores" determined the petitions and not the council as a whole. But the form of answer is always "responsum est per consilium" (*Rot. Parl.*, i. 314). Probably the contradiction is only verbal. *Consilium* was then no more executive than *parliamentum*. The executive consisted of the agents of the crown, the chancellor, privy seal, and so forth; and *auditores*, appointed by the king, expressed the counsel taken on parliamentary petitions.

do much, it is hard to imagine the "parley" doing anything whatsoever independently of the crown. We must not consolidate our nebulæ or materialize our parliaments in a hurry.

The principles and methods of dealing with these petitions in parliament adopted by the king in council can only be inferred from the imperfect records of its practice. With some he will decline to deal at all. Even in the high court of parliament the king will not yet interfere between a lord of the manor and his villeins. Canon law and custom do not permit him to meddle, even on a clerical petition, with the spiritual jurisdiction of the courts christian;[1] and, in spite of the Constitutions of Clarendon, Edward I will not attempt to enforce clerical purgation after the first conviction of a clerk in the king's court. So far as criminous clerks, although convicted of murder, are concerned, while he insists upon judgement, he leaves execution to the indulgent hands of the church.[2] Nor will the king in parliament supersede the common law; as early as 1280 complaint had been made that folk came to parliaments with all sorts of petitions that might be heard by the chancellor or the judges, and an ordinance was issued that none should be brought before the king and his council save those which could not otherwise be determined. Frequently the remedy consists in the grant of a writ or a jury; sometimes advice is all that is needed, and it may be caustic enough; He has suffered no wrong so far, a petitioner is told, let him wait till he has.[3] Some Jews who complained of forcible baptism are informed that they specify no particulars, and that in any case the king has no mind to revoke a christening. As a rule the king and his council in parliament prefer to play the part of general practitioners rather than that of

[1] *Rot. Parl.*, i. 3*a*.

[2] *Ibid.*, i. 41–2; but when the offence was counterfeiting the king's seal, the clerk convict was handed over to his bishop "sub pœna et in forma quâ decet; quia videtur consilio quod in tali casu non est admittenda purgatio" (*ibid.*, i. 40*b*). It seems to have been permissible, however, for "the king's lieges" to oppose the purgation of a clerk convicted of murder or felony (*ibid.*, i. 100).

[3] *Ibid.*, i. 46.

specialists. The vast majority of clients are referred to chancery, the courts of exchequer, or common pleas; and this practice of reference was systematized by an ordinance of 1291–2. It was there laid down that the receivers were to examine the petitions presented to parliament and sort them into five bundles, one for chancery, one for the exchequer, one for the judges, one for the king and his council, and one to consist of petitions which had already been answered.

In most of these cases it is clear that the value of parliament to the petitioner consisted not in the revision or the reversal in parliament of decisions already given in the courts of common law, but in the function it fulfilled of "moving" those courts; and the "moving" was often as peremptory as it was necessary.[1] Not infrequently the judges who had delayed a decision for years were ordered to reach one before parliament ended, which might be a period of a few days and was never more than a few weeks. Delay, too, often arose not out of the dilatoriness of the judges, but out of the novelty of the case. Chancery would issue writs *de cursu* for ordinary suits by its own authority; but it would not issue "original" writs instituting novel forms of procedure without being moved thereto by the authority of the king in council and eventually of the king in council in parliament. In a famous clause of Magna Carta John or his barons had promised that justice should not be sold or delayed; and Bishop Stubbs has said that the *Confirmatio Cartarum* of 1297 stood to Magna Carta in the relation of substance to shadow, of performance to promise. With respect to the delay of justice, it was in and by parliament that some security was afforded for the performance of the promise.

Only petitions of special difficulty or of novelty were reserved for hearing by the king and council, and led to "placita" in parliament. Some of these might have previously been heard in some other court; but it does not appear correct to interpret the phrase "high court" of

[1] "Fiat justitia durante parliamento" (*ibid.*, i. 325*a*).

parliament as meaning a supreme court of appeal. It acted more often as a court of first instance than as a court of error.[1] "High" was perhaps used in the sense in which we speak of highways in distinction to byways, and of the high seas in distinction to the narrow seas. The high seas are called high because they are open and common to all, and a parliament is called a "high" court because it is *le plus frank leu d'Engleterre*, the most open and free of all English courts. Possibly the freedom of parliament implied some immunity from the law's expense as well as from its delays.[2] Certainly in courts like the later Star chamber and court of requests, which inherited some of the traditions of the high court of parliament, justice was freely administered; and there may have been some extravagant hope that the promise of Magna Carta that justice should not be sold meant that no charge would be made for its administration. That was doubtless a fond delusion; fees were required for royal writs [3] and other legal expenses, but it seems that no charge was made for the expedition of suits in parliament.

However that may have been, parliament was only a court of appeal in the sense that the house of commons or of lords is a court of appeal from its committees. The several courts of the *curia regis* were in a sense its committees: in parliament the judges and council sat in common or joint session, and there decided cases reported to them; the whole was held to be greater than the part, in authority and legal wisdom as well as in size. The court held *coram rege et consilio suo ad parliamenta sua* is greater than the court held *coram rege et consilio suo*, just as the latter is greater than the court held *coram rege*. This last comes to be the king's bench; from the second comes the jurisdiction of the king's council, and from the

[1] Maitland, *Memoranda*, p. lxxxv.

[2] Prof. Baldwin has since established this supposition (*King's Council*, p. 282).

[3] In 1348 the fee for a writ out of common pleas was 7*d.*, and out of king's bench 6*d.*; the commons wanted 7*d.* and 6*d.* writs for 3*d.* (*Rot. Parl.*, ii. 170).

first the supreme jurisdiction of the high court of parliament.[1] This whole, moreover, contained more than its expert judicial parts, and the members of the council who were not judges added to this joint session of the courts a lay element which represented the common sense of the high court of parliament. The influence of this lay element upon judicial decisions is characteristic of the political spirit of England, where parliament lays down the legal principles upon which judges have to act. But it was certainly a singular by-product of this constitutional maxim when the peers in the nineteenth century reduced the judges to insignificance in the high court of parliament, and developed the practical paradox that the competence of the lay mind to exercise supreme judicial authority depended upon the accident of primogeniture. The only trace, if any, of this hereditary monopoly of supreme appellate jurisdiction in the time of Edward I is in the presence of earls and barons, who have as yet no hereditary right to a summons, in parliament. "The king," to quote Fleta once more, "has his court in his council in his parliaments, in the presence of earls, barons, nobles, and others learned in the law, where judicial doubts are determined, and new remedies are established for new wrongs, and justice is done to every one according to his deserts."[2]

Fleta's encomium may be somewhat too generous, but there can be no doubt as to the magnitude and the importance of the judicial work of parliaments under Edward I. Two hundred and fifty petitions were presented to the parliament of Michaelmas, 1290, although two other parliaments had already been held that year, one in January and another in April.[3] Five hundred have been preserved for one of the two parliaments of 1305; so that even the thousands which remain in the Record Office probably

[1] Maitland, *Memoranda*, p. lxxx; *Rot. Parl.*, i. 15, 38, 128.

[2] Maitland, *Memoranda*, p. lxxxi. Pollock and Maitland's reading of *iuris peritis* for *uiris peritis* (*Hist. of English Law*, i. 179 *n.* [1]) is adopted by Baldwin; cf. *Rot. Parl.*, ii. 1: "placita coram domino rege et consilio suo apud Westm' in presencia ipsius domini regis, procerum, et magnatum regni in parliamento suo ibidem convocato."

[3] *Rot. Parl.*, i. 46–65.

represent only a fraction of the petitions sent up to parliaments between the reign of Edward I and that of Richard III. They come from all sorts and conditions of men and corporate bodies, and from every quarter of the king's dominions; a king of Norway as well as a king of Scotland is found petitioning Edward I in his parliament;[1] Edward I's own daughter Mary is represented, and the king himself prosecutes his suits there by his attorneys. Earls, bishops, and barons; abbots, abbesses, and abbeys; shires, cities, and boroughs; judges, royal officials, and foreigners; merchants and Jews; the scholars of Oxford[2] and Cambridge; poor men of this and that shire or borough; and even a body of prisoners, all expect justice or favour in parliament. The petitions, indeed, are mostly from individual persons or corporate bodies; they are not the common petitions of the people of England. Nevertheless, if we assume that on an average a score of persons are interested in each petition, and in some the number would rise to hundreds, we shall see that thousands of people, many of them influential, would be concerned in the holding of every parliament, and would have legal business to transact which could not be settled elsewhere.

Here we light upon a motive for frequent parliaments upon which adequate stress has not been laid. We assume that the foundation of parliament was financial, and that its growth was due to the necessities of the king and to the control by parliament over the national purse. No one will deny that finance has played an important part in the development of representative institutions; but there are two reasons against regarding finance as the sole factor in the foundation of the English parliament. In the first place its earliest function was judicial, and financial only in the sense in which Henry I discovered that *justitia* was *magnum emolumentum*. In most of the parliaments assembled by

[1] *Rot. Parl.*, i. 105, 107–13, 225; Maitland, *Mem.*, p. 9.

[2] Oxford, indeed, sent a dozen petitions to a single parliament in 1305 (*Memoranda*, pp. 44–7). There is also a petition from the judges, barons of the exchequer, and clerks for the payment of the arrears of their salaries (*ibid.*, p. 49).

Edward I and Edward II, if not also by Edward III, no financial supply was asked for, and none was granted. Secondly, the frequent summons of parliaments was a measure required not by the crown so much as by its subjects. It is the barons who in 1258 demand three annual parliaments; it is the Lords Ordainers who insist upon one or more sessions a year; and it is the commons who take up the cry under Edward III. We cannot believe that barons or burghers wanted to come to Westminster in order to be taxed three times or even once a year. So far as taxation went, they would have gladly surrendered their control, if they could thereby escape the taxation. If they desired parliaments at all, it was for the justice therein dispensed, and not for the taxation therein imposed.

It was to a high court of law and justice that the taxing and representative factors of parliament were wedded: and it was this union that gave the English parliament its strength. Its absence, the divorce between French *parlements* and estates, was fatal to orderly constitutional development in France. "Whenever a separation is made between liberty and justice," said Burke, "neither is in my opinion safe." Justice and liberty were the woof and the warp out of which was woven the web of the English constitution; but the English people had to endure discipline, law, and order before they could safely afford the luxury of liberty; and the high court of parliament comes before the house of commons.

CHAPTER III

EDWARD I'S PARLIAMENTARY MODELS

ENOUGH has been said in the previous chapter to indicate the inadequacy of the view which sees in parliament nothing but the development of the principle of political representation; but before we proceed to discuss that infelicitous phrase, the three estates, which has been commonly used to describe the form that representation took in parliaments, it may be well to examine a little more in detail the various assemblies to which the word parliament was applied in the latter half of the thirteenth century. Hitherto we have generalized mainly from the proceedings of one of the parliaments of 1305, the records of which have come down to us in a completer form than those of any previous parliament. But the importance of the subject, and the efforts still being made by the house of lords to discover the first real parliament and to elaborate a principle of discrimination, by which to decide peerage claims based upon Edward I's writs of summons, justify an attempt to elucidate the meaning of the word "parliament," to illustrate the variety of its applications, and to prove the impossibility of drawing hard and fast lines. There is little to comfort the committee of privileges in this investigation; but the idea, upon which peerage-law has been grounded, that Edward I created or dreamt of creating hereditary peerages by special writs of summons to parliaments is historically so fantastic that no historian need feel compunction in adding to the difficulties which lawyers have created for themselves by their defiance of history.[1]

[1] Cf. J. H. Round, *Studies in Peerage and Family History*, 1900, and *Peerage and Pedigree*, 1910; Gibbs, pref. to 2nd ed. of G. E. Cokayne's *Complete Peerage*, p. xiii: "it is impossible to reconcile the facts of history with the Law of Peerage."

Important historical questions are, moreover, involved in the discussion, and the truth about the origin of English parliaments can never be a matter of indifference; antiquities may be ignored, but not the beginnings of political or of any other form of life. All origins are, however, obscure, not merely from the defect of records, but because they are imperceptible to contemporary observers; and it is a shallow interpretation to regard parliaments as the creation of Simon de Montfort or of Edward I, or indeed as a creation at all. It is rather a growth from roots stretching back beyond the thirteenth century to a period long before the summons of burgesses or even of knights of the shire to Westminster. The issue of Simon's and Edward's writs did not evoke a new institution out of the void; they merely grafted new buds on to the old stock of the *curia regis*, and it was the legal sap of the ancient stem that fed and maintained the life of the medieval parliament. The species, indeed, was the same, otherwise the grafting would have failed; for law is a branch of politics, and even the seed of representation was raised in a legal frame. On the other hand, Henry II had differentiated law from politics by converting the *curia regis* from an occasional meeting of turbulent barons into a regular court of expert judges; and it was the work of Edward I to reunite these divergent elements in the high court of parliament.

The obscurity of this process of reunion is darkened by nebulous terminology, and the term parliament is applied in the latter half of the thirteenth century to each of the two coalescing factors as well as to the coalition. The common denominator of such various values is bound to be small, and almost any sort of conference, in which the crown was involved, might be called a parliament. But even so general a word as "conference" may acquire specialized characteristics, and come to be spelt with a capital; to a Wesleyan Methodist the term "conference" means a definite body which meets annually and performs numerous binding acts recorded in "Minutes of Conference." So "parliament," while remaining a vague and general term to some,

becomes a term of art to others, and acquires in time distinctive records. The process is common to England, France, Italy, and possibly other countries; and while the specialization of meaning takes different forms, it seems probable that in Edward I's reign, at any rate, there was greater similarity between the French "parlement" and the English "parliament" than has usually been supposed.

At any rate, the use in England did not at first imply any notion of representation or election; for when Matthew Paris first uses it to describe a meeting in 1246,[1] he enumerates its constituent parts as "prelates, both abbots and priors as well as bishops, and earls and barons," and the fact that he calls this parliament "generalissimum," implies that an even less comprehensive assembly might have been called a "parliament" with equal propriety. The word, indeed, has no special signification for him, because two years later he describes a more general assembly comprising *milites* and *clerici* as well as bishops, abbots, priors, earls, and barons, without calling it a parliament.[2] In 1251 and again in 1257 he speaks of a *magnum parliamentum*;[3] but apparently he does not think it worth while to call the gathering of 1254—"an important landmark in the parliamentary history of England," as Stubbs calls it, to which for the first time four elected knights were summoned to Westminster from each shire *vice omnium et singulorum eorundem comitatuum*—a parliament at all.[4] Other writers begin to use the word soon after the middle of the century, sometimes with, sometimes without a qualifying adjective or phrase. T. Wykes speaks of a *parliamentum baronum* in 1260,[5] the "Annals of Waverley" of a *parliamentum magnum* twice in 1265 and once in 1268,[6] and the "Annals of Winchester" of a *parliamentum omnium magnatum* in 1270.[7] "Parliament" is *vox et præterea nihil*; there is nothing to distinguish it from other assemblies called in pursuance of the 14th article of Magna Carta requiring the special and

[1] Stubbs, *Charters*, 1900, p. 328. [2] *Ibid.*, p. 329.
[3] *Ibid.*, pp. 330–1. [4] *Ibid.*, pp. 375–7. [5] *Ibid.*, p. 333.
[6] *Ibid.*, pp. 335–6. [7] *Ibid.*, p. 337.

general summons of tenants-in-chief to give consent to extraordinary feudal aids.

The vagueness of this terminology persists in the pages of the chroniclers throughout the greater part of the reign of Edward I; and a meeting of the king with his prelates and barons may be called a parliament whether or not it also comprises knights of the shires or burgesses. But the printed "Rolls of Parliaments" which begin in 1278 seem to reveal a different conception in the minds of the clerks and lawyers. To them these occasional meetings of tenants-in-chief do not seem to be parliaments at all; and down to the end of the century there is nothing about their proceedings in the "Rolls." There is, indeed, a complete discrepancy between the "Rolls of Parliaments" and the so-called "Parliamentary Writs" compiled by Sir Francis Palgrave as documentary evidence for the early history of parliaments. Down to 1300 the word "parliament" is not mentioned in the special writs to prelates, earls, and barons or in the general writs to the sheriffs and mayors; they are summoned to a *colloquium* or a *tractatum*, but not to parliament. The business of the gatherings to which they are called is not recorded in the "Rolls of Parliaments"; and the meetings whose business is recorded therein were not gathered by any writs that are extant. Allowance must no doubt be made for defects in the records and in their editing; but when there are between 1275 and 1298 nine assemblies summoned by "parliamentary" writs, and fifteen sessions whose business is recorded in the rolls, and when not one of the nine coincides with one of the fifteen, the discrepancy is too significant to be explained away by defective evidence. The gatherings convoked by these so-called "parliamentary" writs were not parliaments; and the meetings called parliaments in the rolls were not summoned by the writs to which the name has since been given.

The point may be enforced by an examination of the proceedings of 1290. In that year there were three "parliaments" in the sense in which the word is used by the clerks of chancery; there is no doubt about their meaning,

because these sessions are repeatedly called parliaments in the records of their proceedings. One began on January 25; the second began three weeks after Easter (*i. e.* April 23) and lasted until July 8, and the third lasted for a month from Michaelmas. For none of these sessions have any writs been discovered. There are, however, writs extant summoning knights of the shires to a fourth assembly on July 15;[1] but this is not a "parliament" according to the "Rolls." Not merely are its proceedings not recorded, but its existence is ignored. Much of the business brought before the parliament of April 23 to July 8 is adjourned *ad proximum parliamentum;* and the "next parliament" is always assigned to Michaelmas, even though writs have already been issued for the assembly on July 15. The adjourned business is taken in the autumn parliament, and none of it at the July assembly.[2]

What, then, were these "parliaments" of the "Rolls," and what was the nature of their business? An answer is suggested by a complaint and an ordinance made in 1280.[3] The complaint is of the delay and inconvenience caused to the folk who come to "parliament" by the great number of petitions which might be dealt with by the chancellor and justices; and the ordinance is that only petitions that cannot otherwise be dealt with are to come before the king and his council in parliament. The business is legal, these parliaments are "parliaments of the council," their essence is royal and judicial, and there is little in common between them and the occasional gatherings of tenants-in-chief summoned by special and general writs in pursuance of Magna Carta to give counsel and consent to demands for aids. Their proceedings are naturally entered in "Rolls," the characteristic records of courts, and they deal with "petitions" and "placita." Their sessions are regular and not spasmodic; they do not depend upon the king's financial necessities; and they are held three times a year. The three parliaments

[1] *Rep. on the Dignity of a Peer*, i. 54.
[2] *Rot. Parl.*, i. 15–45.
[3] Maitland, *Memoranda*, p. lvi.

of 1290 are followed by three in 1291, and there is little doubt that this was the normal practice.

Its antiquity is obscure, but there is no reason to suppose that Edward I invented it. The earliest proceedings recorded in the "Rolls" do not give the impression of novelty; the complaint of 1280 suggests inveterate growth; and the multiplication of forms of original writs during the reign of Henry III would lead us to infer a rapid increase in the number of petitioners at Westminster, and the provision of means to expedite their suits. In 1190 Philip Augustus had ordered the regents he left behind him to hold three judicial sessions a year; and the parlement of Paris, like the English "parliament" of the "Rolls," was a joint session of the several *chambres* or courts of the *curia regis*, to which the name of "parlement" was given as early as 1239.[1] When the English barons in 1258 usurped the position of regents, they arranged for three "parliaments" a year, though their parliaments were to consist, not in joint sessions of royal judges, but in joint sessions of baronial councillors.

The distinction between judges and councillors must not, however, be pressed. Every councillor might partake in judicial proceedings; and these "parliaments" of the "Rolls" were joint sessions of the judges with the less professional members of the council. Prelates, magnates, *proceres*, and clerks were present as well as the justices, though probably no magnate or prelate who was not also a councillor; and in these parliaments the business, while mainly, was not exclusively, judicial. In the "post-paschal" parliament of 1290 the statute of Westminster III (*Quia Emptores*) was passed; the resolution to expel the Jews was adopted; and "so far as in them lay," the handful of magnates present granted *pro se et communitate totius regni* an aid for the marriage of Edward's sister.[2] The need for further consent was probably the reason for the summons to the knights of the shire to meet on July 15. Moreover, there was no narrow definition of legal or judicial

[1] Luchaire, *Institutions Françaises*, p. 562.
[2] *Rot. Parl.*, i. 25*a*, 41*a*.

functions; a *pax* between the Cinque Ports and Yarmouth was *recitata et recordata*—"registered" in the French parliamentary sense—in this parliament, and so were similar agreements between the bishop of Lincoln and the university of Oxford, and between "town" and "gown" in the latter city.[1] Even the taxation of those who were not represented was not yet regarded by Edward I, or by those whom the chroniclers describe as his evil counsellors, as being outside the competence of the "council in parliament"; and in the autumn of 1290 it was decided to levy a fifteenth of their moveable goods from *universi regnicolæ tam clerici quam laici, sæculares pariter et religiosi*, without the consent of any representative assembly.[2] Such exactions were, however, denounced and resisted, for in the worst days of feudalism the crown had possessed no power to levy general taxation. The aids and scutages and even the danegeld and carucages levied on tenants-in-chief were in the nature of rent rather than taxes; they were part of the "consideration" which the tenants owed to their landlord, and the mesne tenants enforced similar claims on their vassals. Arbitrary tallage was an incident of villein tenure, which was due to the lord whether he was a king or a baron. But a general tax on personal property, like a fifteenth, levied on all irrespective of their position as tenants of the king or other lords was a novelty, indicating the supersession of the feudal by the national idea, and providing scope for the maxim *quod omnes tangit ab omnibus approbetur*.

This approbation had been the normal function of the assemblies promised in Magna Carta and frequently held in the thirteenth century. It was not the function of the terminal sessions of the council, whose business is recorded in the early "Rolls of Parliaments";[3] and so far we have had two kinds of meetings, widely differing in composition and character, but both described as "parliaments" by different authorities. One kind, which is so called by the

[1] *Rot. Parl.*, i. 16, 32*b*, 33. [2] Stubbs, *Charters*, p 435.
[3] The outcry raised over the imposition by the "parliament" of Michaelmas, 1290, may have helped to suggest the "model" parliament of 1295.

chroniclers, is or may be a large and tumultuous gathering of tenants-in-chief summoned by special and general writs; and while its potential size is reduced by the practice of permitting from two to four knights to represent all the lesser tenants-in-chief of the shire, it is increased by the admission of representatives of cities and boroughs which are regarded as collective tenants-in-chief of the crown. The other kind of "parliament"—so called by the clerks—is a smaller, regular meeting of the king's council, consisting of some prelates and magnates, most of the judges, and a selection of clerks, and dealing mainly with judicial business. The two bodies are summoned by different methods, meet at different times, and discharge different functions.

But during the latter half of Edward I's reign there is a process of amalgamation, and it is this amalgamation between "estates" and "parlement," rather than his addition of burgesses to the meetings of tenants-in-chief, that constitutes Edward's claim to be the creator of a model English parliament. Not that Edward I completed the process; parliament remained for centuries after his time a composite body, in which judicial and representative elements, legal and political functions were curiously blended, and it still retains the marks of its original heterogeneity. The approximation made in the reign of Edward I was confined to summoning the two assemblies to the same place at the same time and establishing a common session for certain purposes. But inasmuch as this co-operation between "estates" and "parlement" was the main constitutional difference between England and the rest of Western Europe during the later middle ages, the achievement was great enough, and requires greater attention than it has yet received. It was not determined by any large principle or any single dominating cause, but by the cumulative force of a number of small considerations; and the process of adoption consisted of gradual and almost imperceptible changes.

The principal predisposing cause of union was the fact that the crown in council was always present at both kinds

of parliament, in the one to lay before the assembled tenants-in-chief and burgesses the financial demands of the government and to explain the causes of their necessity, and in the other to hear petitions, move the courts, and decide cases about which the judges differed or doubted. It would clearly be a convenience that, when the council was gathered together for judicial business *in pleno parliamento*, it should at the same place and during the same period meet the larger assembly summoned for financial and political considerations. Further, it must be remembered that according to feudal theory every tenant-in-chief of the crown was liable to suit and service at the *curia regis;* and that not merely the joint session of the courts in parliament but each individual session *ad scaccarium, in banco*, or *coram rege* was a session of the *curia*, to which any tenant-in-chief might be summoned; and therefore, although this feudal theory was obsolescent in Edward's reign, the *personnel* from which both kinds of assemblies were drawn might be regarded as potentially identical.

Nor was this identity merely potential. The councillors and judges who heard and determined the pleas and petitions in the terminal sessions of parliament were no doubt comparatively few in number; but Westminster Hall was crowded with "suitors," and "suitors" includes not only litigants but recognitors, jurors, and inquest. It is probable that in Edward's day a terminal session in Westminster Hall was more largely attended and, in spite of the fact that its attendants were not elected, more representative of all sorts and conditions of men than any gathering of the so-called "three estates." It was as a court of justice and not as houses of parliament that the palace of Westminster was called in 1302 *le plus franc lieu d'Engleterre;* and the pleas and petitions heard before the king in council at Michaelmas 1290, provide a more comprehensive picture of national life than the meagre proceedings of the Model Parliament of 1295.[1] There London petitions for its mayor and ancient liberties, and Gloucester against the frequency and severity

[1] *Rot. Parl.*, i. 45–63.

of tallages levied by the "potentes villæ," and asks for an inquiry as to what had become of the proceeds; while Hampshire offers £200 to have its lands disafforested. The people of Appleby beg that they may have a water-mill built out of the 20 marks farm they pay, and offer to raise it to £20 if they may levy market-tolls like Carlisle. "Poor men" come from Norfolk, from Lincolnshire, and elsewhere, with petitions against various forms of exaction. "Plures de populo" present an awkward request for a commission to determine when the courts christian are to be bound by prohibitions and when they may proceed notwithstanding. "Multi de civitate Londonii," complain of conspiracies, machinations, and partiality in clerks and ministers of justice. Canterbury laments the encroachments of its archbishop, and London again accuses the clergy of extorting more money by their citations and excommunications than all the lay officers put together. On the other hand, the abbot of St. Mary's, York, begs to have his liberties defined "propter subtilitatem modernorum," while the Jews complain of compulsory baptism. No electoral system then in existence could have provided so varied a bill of fare for a merely political parliament; and when the law court and the "estates" coalesced, the coalition owed its popularity to the law and not to the politics in which it dealt. Recourse to Westminster Palace was a common custom before Edward I adapted it to the purposes of taxation and representation.

The main difference between the two kinds of assembly was that the presence of petitioners at the court was largely spontaneous, unorganized, and irresponsible, whereas the elected knights and burgesses came in response to official writs of summons, elected and empowered to bind their constituents. But even this distinction must not be overdrawn. The Hampshire men must have been authorized to offer £200 for its disafforestation, and the Appleby men to promise £20 a year for their market-tolls; and they must have been elected or selected by some process or other to represent the grievances or aspirations of their shires and

boroughs. But their appearance was casual and disjointed; and soon after accredited representatives of the shires and boroughs began to be summoned for taxing purposes to the presence of the king in council, the idea must have occurred that it would be a saving of time, expense, and travel to entrust these representatives with the petitions which the communities desired to present for legal redress. The idea would, however, be impracticable unless the representatives foregathered at court *in tempore parliamenti*. The convenience of amalgamation was common to both the king and his people. It was clearly a waste of time for the magnates, who happened to be present in council at the post-paschal session of 1290, tentatively to grant an aid *quantum in ipsis est*, and then to summon in July a meeting of elected lesser tenants-in-chief to consider the same proposal. So, too, the connexion between the petitions for redress presented to the council in parliament and the demands for financial aid presented by the king to elected representatives of the estates was natural; a bargain was inevitably suggested, and the bargaining could only be done satisfactorily if the people empowered to grant the aid were also those in charge of the petitions. The crown would be less amenable to the pleas of petitioners who brought no financial powers with them, and representatives who had no successful petitions to carry home to their constituents would be less responsive to the financial pleadings of the crown. *Justitia magnum emolumentum* was as true in the days of Edward I as in those of Henry I and Henry II; and justice and finance were the two principal ingredients in the parliament compounded by Edward I.

Edward's financial necessities, which arose from his wars in France and Scotland and culminated in 1297, drove him in this direction; but the compounding was not achieved in the Model Parliament of 1295. That assembly, which met on November 27, was "model" only in so far as it completed the representative character of the body summoned to give consent to the levying of taxation; and even in that respect it may have been anticipated by the assembly

of 1275.[1] It was not "model" in the sense of exemplifying that fusion of "parlement" and "estates," of justice and finance, which was the essential basis of the English parliament. The regular terminal sessions had been concluded before the "model" parliament met; the only one in that year, of which any records have been preserved, met on August 15 and sat till the 30th; and though various parties were referred for further hearing to a following session *a die Sancti Michaelis in unum mensem*,[2] there is no reason to suppose that this Michaelmas term was prolonged beyond its normal month, so as to coalesce with the session of the "estates" at the end of November. The Model Parliament of November–December apparently received no petitions and heard no pleas; its business was merely to vote supplies; and there was no scope in it for those judicial functions which made parliament the highest law court in the land and gave it a framework and organization strong enough to save it from the shipwreck that overtook mere representative bodies everywhere else.

It was in 1298, after the crisis of 1297, that we have the first conclusive evidence of a simultaneous session of the representative and judicial bodies. Edward returned from Flanders in March; at a terminal session of the council held about Easter, it was ordained that the exchequer court should be held at York on the morrow, and the common pleas on the octave of Trinity Sunday, that is to say, on the 2nd and 9th of June respectively.[3] A week earlier, on May 25, representatives of the shires, cities, and boroughs were also to meet at York, and corresponding writs were sent to the prelates and magnates, though not, it appears, to the lower clergy. From this time onwards to the end of the reign every session of the representative body coincides with a terminal parliament of the judicature, although of course the latter are more frequent than the former, and it was long before the judicial parliamentary sessions were restricted to the brief periods during which the representatives were kept

[1] *English Hist. Review*, xxv. 231–42.
[2] *Rot. Parl.*, i. 132–42. [3] *Ibid.*, i. 143.

together. The next representative assembly was summoned to meet at London on March 6, 1300, and it is significant that now they are summoned in the writs "ad parliamentum"; for in March 1300 a "parliament" in the sense of the "Rolls" was being held in the capital. Knights of the shire were summoned to York in the following May; and although there are no records of a judicial session held there at that time in the "Rolls of Parliaments," there is in the following year an interesting reference to the "male and female" merchants and burgesses of York who had been brought before the justices of common pleas during their session in that city. For the well-known parliament at Lincoln in January 1301, there are both writs summoning representatives and "Rolls" recording judicial proceedings; and the same holds good for the Michaelmas parliament of 1302, and the Lent parliament of 1305. No records of a judicial session of parliament for 1306 are printed in the "Rolls," but it is practically certain that one was being held in May when knights and burgesses were summoned to Westminster;[1] and records of both kinds of session are extant for Edward's last parliament which was at Carlisle in January 1307.

The presence of these specially and generally summoned prelates, magnates, knights, and burgesses at the time and place of the legal sessions has its effect upon the "Rolls of Parliaments." This legal record is no longer confined to pleas and petitions; and the clerk of chancery who keeps account of these legal proceedings takes over the clerical work of the "estates." In 1305 the presence of these intruders into the court and their dismissal is mentioned in the "Rolls"; in 1307 the names of those who received a special writ, and of the proxies they appointed, are entered, and note is made of the fact that general writs had been addressed to the sheriffs directing the election of knights of the shire and burgesses. All are said to have been summoned *ad parliamentum*, and their business is *ad tractandum super ordinatione et stabilitate terræ Scotiæ, necnon et aliis negotiis*

[1] There is an adjournment of a case to May 1306 (*Rot. Parl.*, i. 180*a*).

dictum regem et statum regni sui specialiter tangentibus. It is true that the name "parliament" is applied in the "Rolls" to these assemblies, not because they contain a complete representation of "estates," but because they are also sessions of the king's council in parliament; and they will be called *plena* and *generalia*, not merely after all save members of the council have departed, but when they have not been summoned at all. The parliament which met on September 15, 1305, is none the less a parliament to the keeper of the "Rolls" because it deals with only judicial business and is not attended by any elected commons or specially summoned magnates. But politicians have been admitted to parliament, and politics have been recorded on the Rolls; in time they will almost expel the judges and usurp the name of parliament; and the word, which is originally used in the "Rolls" of meetings in which there were no representatives, will be restricted to those in which representatives will be the predominant factor.

In Edward I's reign, however, the intrusion of the "estates" was only an episode or an incident in the life of a parliament, an episode which might last no longer than a few days, and rarely extended over three weeks. On February 28, 1305, a parliament was begun; on March 21 not only the knights, burgesses, and clergy, but also the prelates and magnates who were not of the king's council were dismissed.[1] But the parliament still continued: on April 5, in the presence of bishops and other prelates, earls, barons, justices, and other noble clerical and lay councillors, "generali parliamento tunc existente ibidem," letters from the pope were presented to Edward; and on April 6 the king *in pleno parliamento* forbade his chancellor to issue certain letters of protection.[2] This practice continued into the reign of Edward III. A parliament began on Monday, March 17, 1332; on the following Saturday the knights, citizens, and burgesses were dismissed, but the "prelates, earls, barons, and gentlemen of the king's council" were

[1] Cf. Maitland, *Memoranda*, p. xxxv.
[2] *Rot. Parl.*, i. 172, 177–9.

retained, and the proceedings *en pleyn parlement* continued in the following week.[1] It is clear that the prelates, magnates, knights, and burgesses who obeyed the writs of summons to parliament did not constitute a parliament or even make a parliament *plenum* or *generale*. They were summoned to something that was a parliament apart from their presence. The essential presence is that of the council; nothing was called a parliament from which the council was absent; parliament is, in fact, a parliament of the council, and a *plenum* or *generale* parliament was simply a general and full (or public) session of the council. Fleta knows nothing of elected representatives; they are an accretion not yet recognized as indispensable to the composition of a parliament, a sort of slip-carriage or series of slip-carriages which may be detached at any point in the journey of the parliamentary train. The essential factor is the engine of the council, which supplies the motive force and travels all the way.

The organization and business of parliament were as composite as its *personnel*, and the contents of the "Rolls" reflect the varied nature of its proceedings. Its machinery was, however, purely legal in origin, and down to this day the technical details connected with the issue of parliamentary writs and other business are suggestive of those employed in the law courts. Chancery supplied the presiding officer and the clerks of parliament, issued the writs of summons and examined the returns, provided the methods of proceeding by petition and bill, and kept the records; and at times parliament has the appearance of being nothing but chancery turned to political purposes. It was natural that the inorganic "estates" should fall under the management of the organic court of law with its regular sessions, coherent *personnel*, and expert clerks, when once the connexion between the two assemblies had been established; for the "estates" had developed no organization and no records of their own before they came into contact with the organized terminal sessions of the council; and it was not

[1] *Rot. Parl.*, ii. 64–6.

until the later development of the "house" of commons that we discover in the Speaker a parliamentary official who has no essential connexion with the law.

But there were no "houses" in Edward I's reign, and the earliest trace of the organization of "estates" apparently consists of the clerks of chancery who seem to have been allocated to the different groups of representatives to assist them in drafting their replies and perhaps to keep some record of their attendance, upon which the writs *de expensis* were issued when they were dismissed. Even this is a development of the reign of Edward III, and while separate deliberation by different groups may perhaps be inferred for that of Edward I, there is no evidence of it in the "Rolls of Parliament." All that we can say is that the "estates" were called into the presence of the council, presented petitions as individuals rather than as a corporate body or bodies, heard a statement of such of the king's intentions as he thought fit to reveal, and gave assent, perhaps by silence, to his demands for money. These brief and one-sided interviews between the council and "estates" suggested and required little organization. They did not sit together, for the commons, at least, stood in the presence of the king and council, and the attitude of Edward I was somewhat patriarchal. They probably took a less active part in parliament than the audience does in a public meeting of to-day; the council sat on the platform, and the business was cut-and-dried. The commons, at least, were summoned not to decide, but to consent to decisions; and the object of their presence was not to tie the hands of the council, but to unloose the pockets of their constituents.

This was the political business of a parliament; but its first purpose was judicial, and before the estates assembled, proclamation was always made in Westminster Hall and elsewhere that all who had petitions to present should present them by a certain date. Individual prelates, barons, knights, and burgesses may have attended to support the particular petitions in which they were interested; but there were few petitions to Edward I's parliaments of more than local or

personal import; and it is unlikely that the audience for the hearing of others was large. Apart from the grant of money, and the discussion thereof, in which the commons took but a humble part at first, the "estates" had little to do in parliament; and it is small wonder that they were commonly dismissed after a few days or a week or two. Their importance as a deliberative assembly grew slowly with their gradual realization of the fact that their individual petitions, arising spontaneously from different localities, dealt with grievances common to all and might well be fused into common petitions. When that took place, parliament became a political arena rather than a court of law; for, while individual grievances are matters of law, national grievances are matters of politics. The one requires merely judicial action, the other calls for legislation. But this was a slow development of the fourteenth century, dependent upon the growth of a common consciousness among the locally-minded delegates or petitioners whom Edward I dragged or invited into the presence of his council in parliament.

CHAPTER IV

THE MYTH OF THE THREE ESTATES

WHILE the high court of parliament was the correct and official description of the two houses in the sixteenth and seventeenth centuries, the "three estates" was the more popular and inaccurate designation applied to them in the eighteenth and nineteenth; and the phrase has become so deeply embedded in historical terminology that it is accepted as synonymous with parliament without any critical examination of its real relevance. There has, it is true, been some divergence of opinion as to whether the three estates were king, lords, and commons, or lords spiritual, lords temporal, and commons; but the former definition of the term, which was common in eighteenth-century parliamentary oratory, has been frightened even out of school-books by the contemptuous ridicule of nineteenth-century historians. The error, if an error at all, is, we shall see, not quite so flagrant as it has been represented; and in any case, it is only a detail compared with the fact that the more we realize the importance and the permanence of parliament as a high court, the less ready shall we be to accept the three estates as a complete or even a plausible indication of its essential character and constitution. Judicature is not a function of estates; and where three estates have really existed, as in France, they have had little or no connexion with *parlements*. Yet as late as the reign of Henry VII, half the time of parliament was occupied with purely judicial functions;[1] they were discharged by parliament centuries afterwards in passing

[1] The reason still given in 1485 for the appointment of receivers and triers of petitions is "ut justitia conqueri volentibus possit celerius adhiberi" (*Rot. Parl.*, vi. 267).

acts of attainder and indemnity, and are still performed by the house of lords, which exercises them solely because it is a branch of the high court of parliament.

Parliament, however, is obviously more than a high court; it is an assembly of national representatives, and an inquiry into the principles upon which that system of representation has been based is a matter of some importance. The prevalent theory seems to be that during the formative period of parliament the English nation consisted of three "estates" or orders, and that Edward I carefully and deliberately organized parliaments in such a way as to represent these estates. They were, we are told, firstly the church, secondly the nobility, and thirdly the commons; the king could not be an estate of the realm because he was an individual and not a class. The first estate was accordingly represented by the spiritual lords in parliament, namely, the bishops, some abbots, and one or two priors; the second estate by the earls (and subsequently the dukes, marquises, and viscounts as well) and barons; and the third estate by the knights elected for the shires and the citizens and burgesses for the cities and boroughs.

Two general criticisms of this theory at once occur. In the first place, we have been taught by Maitland and others that there is little about *status* in the English law of the thirteenth century, but a great deal about tenure.[1] The most important body in the community consisted of the military tenants-in-chief of the crown; but this tenurial distinction did not correspond with any social or class division. A military tenant-in-chief was, no doubt, often a magnate, but he might be a poor man also; and as early as the first quarter of the twelfth century we find men holding by military tenure-in-chief fiefs so exiguous that the knightly service can only be expressed in vulgar fractions, such as one twenty-fourth of the service of a single fully-armed knight.[2] On the other hand, a sub-tenant may be a rich and powerful person, holding many fiefs of many lords.

[1] Maitland, *Collected Papers*, i. 206.
[2] Pollock and Maitland, *Hist. of English Law*, i. 230–52.

A socage tenant, again, may be rich or poor, and so may a tenant by grand or petty serjeanty. The same individual, moreover, may hold at once different lands by all these different forms of tenure; and all forms of tenure shade off into one another by almost imperceptible degrees. The possession of the smallest estate in chief of the crown will, indeed, subject the tenant to certain liabilities; the king will claim wardship over his heir, the right to dispose of his heiress in marriage, and custody of his lands during a minority; but assuredly his tenure-in-chief will not entitle him to sit in parliaments in person or to vote for the earls or barons who are summoned by special writ. We may think him a member of the second estate, but if he is represented in parliaments at all, it will be by a member of the third. The most striking feature, in fact, of English society in the early middle ages is the confusion of classes; but there can be no system of estates where nothing is based upon status; for status is the Latin for estate; and Edward I was the last man to have thought of organizing a parliament upon a theory which had no foundation in law.

Secondly, neither Edward nor any one else in the England of the thirteenth and fourteenth centuries seems to have had any clear conception of what was meant by an "estate." The word has not been traced back beyond 1307, when the famous letter of the barons to the pope speaks of *l'estat du roialme* and *tous ces estats de prelacie*;[1] and its use in the fourteenth century is almost as vague as it is to-day, when we can speak of a man's estate, meaning either his property or his manhood. Indeed, the word was less determinate then than now, for we have differentiated "status," estate, and state, which were all the same in origin. No one, it is true, talks about the "state" in the middle ages; for that is a modern conception. But it might help to clarify our ideas if, instead of speaking of the three estates of the realm, we talked of the three states of the realm, and remembered that "state" is the English form of "status." When politicians and publicists talked in the sixteenth and

[1] *Rot. Parl.*, i. 219; the Latin record which follows the French petition also has *status regni*, which may be *l'estat* or *les estats*.

subsequent centuries about preserving the state, they often meant the "status quo." The state was something established by law or by custom, something that could not or should not be changed. Any fixed order or species might be a state, and the word implied something fundamental by the law of God or of nature. It was characteristic of the ages in which men had some notion of social statics but none of social dynamics, some desire for order but no conception of progress.

That there was something natural, if not also divine, in the separation of mankind into three classes seemed as clear to medieval philosophers as it did to nineteenth-century railway companies. The idea was as old as Plato;[1] parliament itself in 1401 speaks of a trinity of estates;[2] and Wycliffe writes of the "state of priests, state of knights, and state of commons."[3] This corresponds to a common philosophical distinction of priestly, military, and plebeian orders, though another division was into fighters, councillors, and labourers. There is a vague similarity between these theoretical classifications and the division into church, lords, and commons, of which parliaments embodied a rough representation. But it is a long step from this analogy to the theory that parliament was organized upon the basis of three estates; and in practice there was little in common between the two. The first estate was the church; but in parliaments, after the reign of Edward II at any rate, the church is represented only by the bishops, some abbots, and one or two priors; and they are summoned, or rather, are liable to summons, not because they represent the church, but because they hold land *per baroniam*, by military tenure-in-chief of the crown.[4] They

[1] *Republic*, ii. 370 *sqq.* [2] *Rot. Parl.*, iii. 459*b*.

[3] *English Works*, ed. Arnold, iii. 184. Cf. also Hallam, *Middle Ages*, iii. 105–6, and Stubbs, *Const. Hist.*, ii. 172 *n.*

[4] See Pike, *Const. Hist. of the House of Lords*, pp. 155–6, 219. It is inaccurate to say that they were summoned because they held baronies, for many who held baronies were not summoned at all. They were summoned because the king desired their counsel; and their baronies gave him a lien on their suit and service at his court. The crown was not prepared to abandon the bishops to the papacy, and they were expected to be royal, as well as papal, courtiers.

are, in fact, barons as well as prelates, and Henry II had laid it down in the Constitutions of Clarendon that they were liable to suit and service, like other barons, in the king's court; and Edward III's answer to the prelates who complained of taxation in 1341 unmistakeably implies that they were summoned to parliaments because they held by barony.[1]

This view has been disputed, and a spiritual right to be present in parliament has been asserted, mainly on the ground that during the vacancy of episcopal sees, the guardian of the spiritualties who did not hold *per baroniam* received a special writ of summons like a bishop. But he received this summons because of the *præmunientes* clause it contained, requiring him, as the only person capable of so doing, to cause proctors to be elected for the clergy of the diocese of which he had temporary charge, and not for the sake of securing his personal presence in parliament. Certainly no abbot ever sat by a spiritual title, and the ground upon which many of them sought to evade the duty of attendance, was always an allegation that they held no land *per baroniam* and therefore were not liable to a summons. The force that brought spiritual and temporal lords together into one house of lords was clearly not their common membership of the same estate, for *ex hypothesi* they belonged to two sharply distinguished orders, but their common receipt of a special writ of summons based on their common tenure-in-chief from the crown. "Comme ercevesques et evesques," plead the prelates themselves in parliament in 1352, "tiegnent lour temporaltes du roi en chef et par tant sont pieres de la terre comme sont autres countes et barons."[2] If the house of lords is an estate at all, it is an artificial estate created by the action of the crown out of heterogeneous elements gathered from all the three normal estates of theory—bishops and abbots from

[1] *Rot. Parl.*, ii. 130. The prelates "qui tiegnent du roi par baronie et deyvent venir au parlement par somonse" are told that they must pay a ninth; while clergy "qui ne tiegnent rien par baronie ne ne sont pas acoustumes d'estre somons au parlement" need only pay a tenth.

[2] *Ibid.*, ii. 245. It has not, I think, been established that a guardian of spiritualties ever sat in parliament on that ground.

the first, earls and barons from the second, and councillors, judges, and secretaries from the third.

Nor was the second estate more satisfactorily represented in the house of lords than the first. The theory of three estates would seem to imply that each member of an estate is entitled either to be present at the estates-general in person or to vote for the election of a representative; at any rate, that was the interpretation adopted at the great assembly of the estates-general of France in 1789. But no one—save its *ex-officio* members, the chancellor, the treasurer, and so forth—has ever sat in the house of lords except in response to a special writ of summons; and the vast majority of the military tenants-in-chief received no special writ, and were represented in the house of commons. If there was ever a noble estate in England, it was unceremoniously cut by English monarchs into two unequal sections, the smaller of which was called to the house of lords, while the larger was relegated, in the persons of the knights of the shire, to the third estate in the house of commons. For the knights of the shire were barons, the *barones minores* who, according to Magna Carta, were to be summoned to give their advice by general writs addressed to the sheriff and not by special writ addressed to the individual baron. The house of lords is not an estate of the realm; if it represents estates at all it is a royally compounded mixture of fragments of estates.

Least of all is the house of commons a third "estate." It is no mere assembly of *bourgeois* like the old *tiers état* in France. Its most important and turbulent element in the middle ages consists of the knights of the shire, *barones minores*, *milites*, or *chivalers*,[1] as they are called, who were tenants-in-chief of the crown, who often called themselves "nobles,"[2] and who belonged by the theory of estates to

[1] We should be inclined to regard *miles* and *chivaler* as synonymous, were it not that a knight of the shire is sometimes described as *miles et chivaler* in the "Official Return of Members of Parliament." Nor must we identify *milites* with *barones minores*, since even an earl was often a knight as well (cf. *Magna Carta Essays*, Royal Hist. Soc., pp. 46–77, 100).

[2] The "nobility" in England down to the sixteenth century included, as it did in France, the *petite noblesse*.

the second and not to the third. It was their combination with the city and borough members that gave the house of commons its singular strength in the middle ages and made it unique among representative institutions. But it was no estate of the realm; it was a concentration of all the communities of England, shires, cities, and boroughs; and it consisted no more than they did of a single class. If it represented one estate more than another, it represented the second rather than the third; for the knights of the shire were often nominated by its magnates, and the same magnates sometimes controlled the elections for the boroughs on their domains. Lastly, in a system of three estates there is no natural or logical place for the large official and legal element which we find throughout in the high court of parliament.

These facts, or some of them, have been generally recognized by historians, who nevertheless accept the fundamental truth of the theory of three estates; and the inconsistency between that theory and the facts is explained by the contention that the English have never been logical, and that parliaments represented only a rough approximation to the orthodox theory. If a clerk of a fourteenth-century parliament writes of the judges or merchants as being "estates," or refers in a hazy way to half a dozen or more "estates," the reference is regarded as a slip of the pen, a loose use of the phrase, or a mental aberration.[1] The difficulty is, however, to discover the evidence for the norm, from which these exceptions depart. Exceptions no doubt will prove a rule, but only if they can be proved to be exceptions; we must satisfy ourselves that the exception is not the rule, and so far from being able to show that it was the custom to regard a parliament in the fourteenth century as an assembly of three estates consisting respectively of lords spiritual, lords temporal, and commons, we cannot, I think, adduce a single instance of such

[1] Cf. Maitland, *Memoranda*, p. lxxxiii. We are apt to think that "whatever upon our record makes against this belief should be explained away as irregular or anomalous."

a description until towards the close of the reign of Henry V.

Certainly, the only known description of parliaments in the fourteenth century, the *Modus Tenendi Parliamentum*,[1] knows nothing of three estates or, indeed, of any estates at all. This tract has been commonly treated as a fanciful sketch of no authority for somewhat inadequate reasons, unless its disagreement with orthodox views be regarded as a sufficient ground for neglect. It is true that its opening statement, professing to give an account of the method of holding parliaments in Anglo-Saxon times, does not commend it to historical students; but the fact that it is of no value for Anglo-Saxon history does not disprove its claim to be considered as of some authority on the parliaments of the century in which it was written, any more than chroniclers who begin with the Creation are to be ignored when they come down to contemporary history. Its composition has been assigned to the opening years of Edward III's reign, mainly because it mentions no viscounts, marquises, or dukes, but only earls and barons among the magnates, and the first English duke was created in the person of the Black Prince in 1337. At least three of the extant MSS. date from the fourteenth century; and it seems to have been regarded early in the fifteenth century as an authoritative rather than a fanciful description. At any rate, a revised version of it was sent over to Ireland in 1418 by the privy council to inform the lord deputy of the method in which parliaments should be held in Dublin; in 1510 the clerk of the parliaments thought it worth while to transcribe the treatise and prefix it to the *Journals* he had to keep; and another copy was apparently handed from clerk to clerk of the house of commons.

[1] The best edition of the *Modus* is that by Hardy (London, 1846), from whose text Stubbs printed it at the end of his *Select Charters*. The Irish version of 1418 was first printed in 1911 in R. Steele's *Bibliography of Proclamations* (Oxford: Clarendon Press), i. clxxxviii–cxci. Numerous MS. copies of the English version were made, and in the first half of the seventeenth century it was a favourite text for parliamentary lawyers like Hakewill and Elsynge to edit. Some attention has been given to it by members of my seminar, and a preliminary survey of forty-seven MSS. extant in the British Museum was published in the *English Hist. Review*, April 1919, pp. 209–25.

Now, the *Modus*, while saying nothing about three estates, says a good deal about six "gradus" of parliament; and these "grades" or orders are the king, the prelates, the ecclesiastical proctors, the lords temporal, the knights, and the commons. The Irish version of 1418 contains some important modifications of the earlier English version; but there are still six grades of parliament, each with its own clerk, each deliberating apart, and reporting its answers separately to parliament. It would in any case be somewhat arbitrary to ignore this evidence, and such neglect becomes impossible when the general conclusion to be derived from the *Modus* as regards the three estates is confirmed by the "Rolls of Parliament" themselves. The *Modus* gives too few rather than too many "grades" of parliament; for the judges are sometimes described in the "Rolls" as an estate, the "chivalers" as another, and the merchants were summoned by writ as a separate class in 1339 and 1340. This latter practice was, however, prohibited, on the petition of the commons, in 1362 and 1371; and the judges are seldom described as an estate. That the "Rolls" should describe them as such at all, and that they should speak of prelates, lords temporal, knights, judges, *et tous autres estats*,[1] being charged to deliberate one by one, is sufficient evidence that these estates themselves, or the clerk of the parliaments who recorded their proceedings, knew nothing of any sacrosanct trinity of estates. The most formal and authoritative definition of "a parlement somond of all the states of the reaume" is given by Chief-justice Thirning on the solemn occasion of Richard II's abdication; and he enumerates them as: (1) archbishops and bishops; (2) abbots, priors, and "all other men of Holy Church, seculars and regulars"; (3) dukes and earls; (4) barons and bannerets; (5) bachelors and commons, who are divided into two sections, those "by south" and those "by north." He also refers to "the state of kyng," and, besides the "states," to "all the people that was ther gadyrd by cause of the sommons

[1] *Rot. Parl.*, ii. 278, iii. 100.

forsayd," by whom Richard's renunciation and cession "ware pleinelich and freilich accepted and fullich agreed." [1] Even when we do come, in the first year of the fifteenth century, across an allusion in the "Rolls" to three estates, they are not the three of constitutional orthodoxy; and it is as a trinity of king, lords, and commons that the last-named describe the three estates in their address to Henry IV in 1401.[2] If the commons had enjoyed the advantage of reading our modern constitutional histories, they might have avoided this "error," into which Burghley fell in 1585 [3] and Charles James Fox and thousands of others in the eighteenth century.[4]

It is in 1421 that we get the first official reference to parliament as consisting of *tres status, videlicet, prelatos et clerum, nobiles et magnates, necnon communitates dicti regni*; [5] and the circumstances of this reference suggest an interesting explanation of the introduction of the phrase into English parliamentary usage. The Peace of Troyes had been concluded between Henry V and Charles VI of France, and every formality was to be observed which might render it and the union of the two crowns binding. The peace was accordingly to be sworn to by the three estates of the two realms. It had been signed in France, where there really was a system of three estates, and the advantages of uniformity suggested the employment of identical phraseology when the treaty was sent over to England for confirmation. From this time the phrase comes slowly and doubtingly into English official and popular use.[6] The process was eased by the contact of the English government with systems of three estates in its French

[1] *Rot. Parl.*, iii. 424; Hughes, *Chaucer's England*, pp. 293–4.

[2] *Ibid.*, iii. 459*b*; Stubbs, ii. 172 *n*.

[3] D'Ewes, *Journals*, p. 350; Bishop Aylmer has the same definition (*An Harborowe for Faithfull Subjects*, 1559, H. iii.); and so has Bishop Gardiner (Foxe, *Acts and Mon.*, vi. 51).

[4] Lecky, *Hist. of England*, 1892, iii. 388 *n*.; B. Whitelocke (*Notes on the King's Writ*, ed. 1766, ii. 43) takes the same view.

[5] *Rot. Parl.*, iv. 135, v. 102–3. Even this adds "clerum" to the conventional "lords spiritual."

[6] *Ordinances of the Privy Council*, ed. Nicolas, v. 297, vi. 71; *Rot. Parl.*, iv. 420, v. 128, vi. 39, 424, 444.

provinces; and the privy council speaks of the three estates of Guienne before it speaks of the three estates of England or Ireland.[1] Englishmen, however, seemed to be conscious of the false assimilation, and the phrase "provincial estates" was never apparently applied to the assemblies of the so-called English palatinates. Fortescue will not call parliament three estates; he cautiously remarks that the three estates of France "when they bith assembled, bith like to the courte of the parlement in Ingelonde"; and Commines will only say of Edward IV's parliament that it *vault autant comme les trois estatz.*[2] And the phrase in its older and vaguer sense continued in vogue. Bishop Stillington, in 7 Edward IV, calls the lords spiritual, lords temporal, and commons the three estates of the realm, but speaks of a royal estate over them all.[3] The council talks in 1440 of the "estates of holy church," just as in Edward I's reign the "Rolls" speak of *tous ces estats de prelacie.*[4] In 1491 Henry VII, in a proclamation, speaks of being informed "by the estates and nobles"; in 1497 Perkin Warbeck refers to Henry's projected flight "in person with many other estates of the land"; and in 1513 the commons desire "the great estates, peers and nobles of this realm" to grant adequate taxes. A chronicler of Henry VII's reign gives the following illustrations of the persistent indefiniteness of the phrase: "there stood the king, queen, and many great estates of the realm . . . the said estates took their horses and chairs, and so rode to Richmond," and again, "considering the great and notable court that there was holden, as first the king, the queen, my lady the king's mother, with my lord of York, my lady Margaret, and divers other estates."[5]

[1] Nicolas, v. 161.

[2] Fortescue, *Governance of England*, ed. Plummer, pp. 113, 195.

[3] Fortescue, p. 127, also says that the King's estate is the highest estate temporal on earth. So James I says the "state of monarchy is the supremest thing on earth." (Prothero, *Documents*, ed. 1898, p. 293.)

[4] *Proceedings of the Privy Council*, v. 88, 148; *Rot. Parl.*, i. 219.

[5] Steele, *Proclamations*, i. No. 17; my *Henry VII*, i. No. 108; Kingsford, *Chronicles of London*, pp. 222, 245, 253, 263; *Lords' Journals*, vol. i. p. xxvi.; cf. *L. and P.*, 1539, i. No. 858, "states doth daily assemble against the parliament."

The impression produced by this divergence and vagueness in the use of the word "estates"[1] is borne out by what we know of the medieval organization of parliaments. Fleta is apparently unaware of their existence; to him parliaments are sessions of the king's council in the presence of earls, barons, nobles, and other learned men; in 1305 a parliament can still be a "full" parliament when all but the councillors have withdrawn; and as late as the reign of Henry VI the lords can be described as being "in full parliament" without any other assessors.[2] Even when other elements, nominated and elected, come to be recognized as normal if not essential additions to the council for parliamentary purposes, they are not regarded or organized as three estates. They meet and transact their public business in a single chamber, the *camera magni consilii vocata le parlement chambre*, otherwise known as *la chambre blanche pres de la chambre peynte*,[3] or else in that Painted Chamber, sometimes called the chamber of Edward the Confessor, where, down to the nineteenth century, conferences between the lords and commons continued to be held.[4] In this council chamber, which came

[1] This absence of definite estates is illustrated by a corresponding absence of, or vagueness in, the designations now used to indicate differences of status. Originally *baro* simply meant a man; the *barones majores* were the king's greater, and the *barones minores* his lesser, men. In the fourteenth century, while a tenant by barony might be described as "baro" of such and such a barony, just as we may describe so-and-so as lord of the manor of this or that place, the word "baro" was no more used as a title of honour than lord of the manor is to-day. There was nothing in his designation to distinguish a "peer" from a knight; the knight may have been a lesser baron, but his inferiority was expressed in the extent of his holding and his lack of a special summons, and not in his mode of address; and the baron might or might not be a knight. "Dominus" and "Sir" were titles they shared alike, and they shared them both with priests; it was not until after the Reformation that "Dominus" and "Sir" were replaced by "Reverend" as the normal prefix to a cleric's name. "Dominus," moreover, as applied to a priest, was inferior to "Doctor" and even "Master," and seems to have been applied regularly to those who had taken no University degree or none higher than that of Bachelor, a custom still retained at Cambridge.

[2] *Proceedings of the Privy Council*, iii. lxi.: Nicolas interprets the phrase as meaning "a full meeting of peers." But there are other lords than peers; "lords of parliament" would be more correct.

[3] *Rot. Parl.*, ii. 225, vi. 232.

[4] May, *Parliamentary Practice*, p. 496.

to be called the parliament chamber because the council parleyed there, lords and commons still assemble as one gathering before the throne to hear the king's speech, the prorogation or dissolution of parliament, and the royal assent to legislation, although the historical origin of the chamber is effectually concealed beneath its modern name of the house of lords. Edward I knew no more of two houses than he did of three estates; and in his reign and in those of his son and his grandson, all the formal work of parliament is done in common session. It is only the work thus done in common, and perhaps in public, that is officially recorded in the "Rolls of Parliament." Such are the "acts" of parliament.

This common session, however, while convenient and even indispensable for the formal proceedings of parliament, was no less inconvenient for its real work of deliberation and discussion. Only rigid rules of procedure, the result of six centuries of elaboration, enable a body so homogeneous as the present house of commons to transact any business at all; in the assemblies which the first two Edwards called few rules of procedure had yet been evolved, and the gatherings, whether they consisted of six grades or of three estates, were too heterogeneous to act in common. If the king extracted any response at all to his demands for money or requests for counsel, it would be a babel of tongues. Intelligent answers could only proceed from previous consultation; and the exigencies of consultation required some sort of organization. The accepted theory is that this organization took from the first the form of two houses or three estates; the *Modus Tenendi Parliamentum* speaks, on the other hand, of six grades, assigning to each a clerk, whose function was presumably to reduce the resolutions of his "grade" to writing, and possibly to keep some record of its proceedings. The "Rolls of Parliaments" do not support either theory in its entirety; they refer vaguely to an indefinite number of "estates"; but never, I think, to more than two clerks. One was the clerk of the parliaments, who sat in the parliament chamber, and

still sits in the house of lords;[1] and the other was the clerk of the *domus communis*. There may have been more; the proctors of the clergy doubtless had a clerk of their own, who might also be a clerk of convocation, and the different answers sometimes returned by the knights and the burgesses imply separate deliberation and possibly separate clerks to record their results. But if the picture drawn in the *Modus* ever represented actual practice, that practice was greatly modified during the fourteenth century; and by a process of elimination and amalgamation the six grades were reduced to three or two.

In the first place, the clerical proctors preferred to give their answers to the king's proposals in convocation, and absented themselves from the parliament chamber, though their right to petition the king in parliament remained, and in Richard II's reign, the appointment of Thomas Percy as clerical proctor, to assent to the proceedings against the Appellants, paid homage to the doubtful theory that clerical consent was necessary to their validity.[2] This abstention eliminated one of the six "grades" of the *Modus*. Another disappeared with the amalgamation of the knights and burgesses, and a third with the merging of the specially-summoned barons and prelates under the common designa tion of "seigneurs" or "lords" of parliament. The process was thus complete by which parliaments came in appearance to consist of two houses and of three estates. It was due, however, not to any preconceived ideas about the value of a bi-cameral legislature or of a threefold system of estates, but to the operation of royal writs and political convenience. It was the custom of the king's chancery, in issuing special writs of summons, that differentiated the lesser from the greater baron, the "peer" from the knight

[1] His present postal address, "Clerk of the Parliaments, House of Lords," is in itself an item of historical evidence. The use of the plural, "parliaments," and the juxtaposition of the two terms, point the contrast between the medieval and the modern view of his position.

[2] *Rot. Parl.*, iii. 348, 356. There is no evidence of the actual presence of the well-known Thomas Haxey in the parliament of 1396; he seems merely to have sent up a bill to the commons upon which they acted (*ibid.*, iii. 339).

of the shire, and one abbot from another. As early as the reign of Edward III there was a list in existence of twenty-eight abbots whom it was not customary to summon by special writ,[1] and this custom made some of them lords of parliament and left others out in the cold. It was political convenience that led the knights of the shire to coalesce with the burgesses, and induced the clerical proctors to confine themselves to convocation.

Both the process of coalition and that of elimination would have been impossible had there been any marked division of estates. The mere fact that the knights of the shire could separate from the other barons and throw in their lot with the burgesses proves that the lines of demarcation were not deep or fundamental. There was, indeed, a sharp distinction between the freeman and the villein; but that had nothing to do with parliamentary organization. The villein had no "estate" in anything, and nowhere did he constitute an "estate" of the realm. He had no status or *locus standi* in the king's court, except in so far as he was protected by the king's claim to criminal jurisdiction, and therefore none in the king's high court of parliament. The other clear distinction in English medieval society was between layman and clerk; but that, too, soon ceased to influence parliamentary organization, because the proctors ceased to attend, and in the "upper house" or great council in parliament the common receipt of a special writ overrode the distinction between spiritual and temporal; the peers did not act as two estates, but as counsellors of the crown.

This had an all-important effect upon the course of English constitutional history, and saved the country on more than one occasion from formal revolution. If the necessary assent of the lords spiritual and temporal to legislation had involved the independent assent of a majority of each "estate," many a change constitutionally carried out could only have been effected by revolution. As it was, spiritual votes could help to carry temporal reforms

[1] Pike, p. 349; see below, p. 99.

in the teeth of a majority of temporal peers, and temporal votes could carry religious reforms in spite of spiritual peers.[1] The bishops and abbots protested against the statutes of provisors and præmunire; they were none the less law for that, and the prelates did not pretend that their protest had the effect of a royal veto. A majority of spiritual peers did, indeed, vote for Henry VIII's and Somerset's ecclesiastical changes; but with Warwick's accession to power and the adoption by the government of definitely protestant proposals, this ecclesiastical acquiescence disappeared, and the crisis came in the first year of Elizabeth. Every spiritual peer present voted against her act of supremacy and her act of uniformity, and the latter was only carried by a majority consisting of twenty-one temporal peers over a minority consisting of eighteen spiritual and temporal peers. By no conceivable stretch of language could it be contended that the spiritual "estate" had consented to Elizabeth's settlement of religion, although the notion of three estates had by this time made sufficient way to countenance the theory that the assent of each was indispensable to the validity of legislation. If this was the true theory of the constitution, then, indeed, the acts of supremacy and uniformity were not merely unconstitutional, but illegal; in fact, they were no acts at all, and the courts should have refused to carry them out. But it was not, and never had been, the true theory of the constitution, because parliaments had never consisted of estates at all. Nor was it possible to escape from the dilemma by the hypothesis that a majority of two out of the three estates could over-ride the third; for in that case the lords spiritual and temporal could always have legislated in defiance of the commons, but in Henry VII's reign the judges had laid it down that even for an act of

[1] It has often been contended that Elizabeth's ecclesiastical settlement was unconstitutional because it was carried against the votes of the spiritual peers; but the same theory would invalidate temporal measures carried by episcopal votes, except on the assumption that ecclesiastical affairs were the concern of ecclesiastics alone, but state affairs were the common concern of laymen and ecclesiastics.

attainder, an almost purely judicial function, the co-operation of the commons was essential.[1] The theory of the three estates would, in fact, if there had been any substance in it, have stereotyped and petrified the constitution in the middle ages. But Englishmen's political instinct has always been sounder than their scholarship or their logic; and constitutional progress has not been seriously impeded by the theories of constitutional historians.

It is, indeed, hardly too much to say that parliament, so far from being a system of three estates, is the very negation of the whole idea. A system of estates is built upon the principle, not of national, but of class representation; it suggests that a nation is not one, but three states, each with an independent will of its own, and each entitled to veto national progress. It was by no accident that the first step in the first French Revolution was the fusion of the three estates into one National Assembly. The difference between English and French development was that in France the fusion was instantaneous and therefore caused an explosion, while in England it was a gradual transformation spread over centuries. The reduction of the six "grades" of the *Modus* to two or three was an illustration of the process, and a proof of the elasticity of the English political and social system. There were no fixed gulfs between the different grades which the royal authority could not bridge. If the knights deliberated apart from the magnates, it was not because there was any social barrier between them, but because the crown directed them to deliberate with the commons; and conversely it directed the prelates and magnates to consult together.[2] The crown, too, could issue a special writ of summons to a knight and thus convert him into a magnate; and by a

[1] See my *Henry VII*, ii. No. 14.

[2] *Rot. Parl.*, ii. 135. This explicit direction of the crown in 1343 implies that prelates and magnates, knights and burgesses might have otherwise, and probably had previously, deliberated apart and returned separate answers; and if, with Mr. Pike, we assign the *Modus* to the second quarter of the fourteenth century, this direction would tend to strengthen the credibility of its division of parliaments into six grades.

writ of distraint could make an esquire into a knight. The most permanent factor in the English medieval representative system consisted of the knights of the shire, and they represented, not an estate, but the shire courts of the realm. "Status," indeed, entitled no one to any position in medieval parliaments; their composition and their organization were alike determined by royal writs and royal directions. Even to-day it is a royal writ, and not hereditary right, that entitles a peer to sit in the house of lords; and it was a royal writ that entitled a borough to elect a member of the house of commons. It is true that through judicial decisions in one case, and through statute law in the other, the crown has lost the power of refusing a special writ of summons to the eldest son of a peer or a general writ to a borough; but without the writ the peer's heir could not take his seat and the borough could not elect, and the modern form is the relic of a medieval power.

Nor is it without significance that the English was the only representative system called a parliament, or that other nations, when they set about imitating English institutions, abandoned the name of estates. Emphasis has, in fact, been continually laid by constitutional historians upon the differences between English and foreign representative systems; but it is singular that they should have sought to fix upon the English parliament a designation appropriate only to those estates from which its difference is so clearly marked. Estates-general could only vote taxes and petition for redress; they could not impeach, or pass acts of attainder, or enforce the responsibility of ministers. For they were not a court of law, and it was from its armoury as the sovereign court that parliament drew the weapons it used with most effect against the crown. Its procedure by bill was borrowed from chancery, its powers of judicature were inherited from the *curia regis*, its acts have always been "due process of law"—a character which American judges have denied to acts of the American congress; for that is not a parliament or a court.

The ineffectiveness of estates-general arose from the fact

that they were nothing but a body, or bodies, of representatives. They were not numbered among the "cours souverains" of France, and the judicial functions performed by the English parliament were left in France to the non-representative *parlements*. The use of impeachment and acts of attainder in England from the fourteenth to the eighteenth century may have involved injustice to individuals, but it was of inestimable service to English constitutional progress that the judicial review of state offences should have been preserved for the English representative assembly by the fact that it was a parliament rather than a system of estates. It was hardly of less importance that the representative elements themselves, when added by Simon de Montfort and Edward I to the king's council in parliament, should have appeared in a juridical guise. Every suitor to the county court in which members were returned to the house of commons was an actual juror; the elector was present at the election primarily because he had to attend the court for judicial business. And the legal capacity clung to their representatives; if the lords in parliament were its judges, the commons, says Prynne, were "informers, prosecutors, grand jurymen." "Through all their history, too, the Commons have remained 'the Grand Inquest of the Nation.' Judges and inquest the two Houses were before they were joined; Council and Grand Inquest they remained; and this conception of their origin, their character, their duties, and their privileges serves in a large measure to explain throughout the history of Parliament not only the claims of one House against the other, but also their common claims as the High Court of Parliament."[1]

But while parliament consists, in its judicial aspect, of judges and inquest, it is in its political aspect a meeting of council and community. Members of the upper house have properly claimed to be historically the counsellors of the crown, although hereditary right was not the original basis of their title to give counsel to the crown; and

[1] McIlwain, *The High Court of Parliament*, pp. 186–7.

historically the house of lords is the king's council in parliament. No quorum was, however, required to give validity to the action of a royal council; because its function was to advise, and the act was always the king's. Thus the *Modus* goes so far as to say that even though every specially-summoned magnate absented himself from a meeting between the crown and the community, the meeting might still be a valid parliament. The two essential factors were the crown and the community, that *communitas communitatum* which came to be called the house of commons. If this seems modern, it is also medieval doctrine; and the conservative value of history is that, when properly understood, it helps us to see how reform succeeds not by innovation, but by the renovation and expansion of the principles and practice out of which the constitutional fabric has been made. If parliaments had ever been based on a foundation of three estates, our constitutional development would have encountered that dilemma of stagnation or revolution which sooner or later has confronted every representative system founded on class divisions. It was a happy fate for England that its parliaments were dominated by elements, ideas, and a procedure emanating from the *curia regis* until after its estates had been merged by the growth of national feeling into a single state.

CHAPTER V

THE FICTION OF THE PEERAGE

In speaking of the "fiction" of the peerage, no allusion is intended to certain sumptuous and annual publications, the genealogical contents of which might fairly entitle them to that description. Nor is it meant to deny that a work of fiction may be good as well as bad. Fictions, and especially legal fictions, have played a great and sometimes a beneficent part in English constitutional history. The presence of the king in every court and every parliament in the empire is a useful fiction; the dogmas that "the king never dies" and can do no wrong, are others of no less value. By means of fictions judges have made law, and there is a considerable element of truth in the claim that on some occasions national legislation by the judges over-rode the class legislation of parliaments.[1] At times the fictions of the courts have been strong meat, and the identification of Cheapside with "the high seas," which was once effected in a court of law to bring a case within its jurisdiction, marks perhaps the limit to which the process should be carried.[2] But the house of lords is the highest court of law for civil jurisdiction in the British Isles, and it is natural that there legal fictions should have winged their highest flight. Certainly no legal fiction runs counter to more historical fact than the rule of the house of lords that a special writ of summons to the Model Parliament of 1295 entitled its recipient and his successors to an hereditary peerage, and consequently to a special writ of summons to every succeeding parliament until his lineage

[1] T. E. Scrutton, *The Land in Fetters*, p. 76.
[2] McIlwain, p. 266.

was extinct; and that if a commoner can to-day prove himself to be the eldest male descendant in the eldest male line of any one who has since 1295 been specially summoned to and taken his seat in a parliament, he becomes thereby entitled to a peerage of the United Kingdom and his blood is ennobled for ever.

Before we proceed to examine this tissue of legal fiction and its bearing upon the history of parliament, it may be well to enter a plea on behalf of the committee of privileges which advises the house of lords on peerage cases. Every one of the distinguished lawyers who constitute that court is perfectly aware by this time that this rule is based on a mass of historical falsehood; he will none the less be bound in conscience to enforce it as the law. For the law takes little cognisance of historical fact until the fact has been interpreted by the law; and then the interpretation becomes both fact and law. Once the interpretation has been accepted, the historical fact or fiction upon which it was originally based becomes irrelevant; and no amount of historical investigation can affect the law. It is the law of the land that any one who proves himself the heir of a magnate of 1295 is entitled to a peerage. Not even the crown can debar him from it; and the court is bound to enforce that law. It is also apparently bound to do far greater violence to historical truth, to interpret historic facts of the fourteenth century in the light of a law that was not evolved till the seventeenth, and to assume that when Edward I or Edward II summoned a man by special writ to a parliament he intended to create an hereditary peerage. From the point of view of the court it is entirely irrelevant to prove that Edward I would not have known what the phrase "hereditary peerage" meant, that he never created or intended to create one in his life, that scores of barons summoned by special writ to one parliament were not summoned again, and that no one for more than a century after Edward I's death dreamt of claiming a right to a peerage at all.

All this would be merely historical fact; to impress the

court one must show that this historical fact had been interpreted as law. It is fortunate for the peerage that the house of lords can take no cognisance of historical fact which conflicts with its own judicial interpretations. If the house of lords says a commoner is a peer, he is a peer, however inadequate or erroneous its reasons may have been. A peerage adjudged to a claimant on the strength of a forged pedigree is not forfeited by the subsequent proof of the forgery. A peerage adjudged to the heir general on the strength of the presumption that it was created by writ of summons is not forfeited by the subsequent discovery of letters patent limiting its descent to the heirs male; for no writs of error lie against the house of lords, interpretation supersedes the fact, and the law is superior to history. This, indeed, is common sense; *quod non fieri debuit, factum valet.* Much of the law of England might disappear altogether if its legality depended upon the historical accuracy of the claims to peerage possessed by those who voted for it; and the legal foundations of the English church itself would no longer be secure if the validity of Elizabeth's act of uniformity could be shaken by attacking the pedigrees of three of the peers who constituted the majority in its favour.

We are not, however, here concerned with the legal validity of the lords' decisions, except to point out that the law of the peerage is not historical evidence, and that judicial theories are as irrelevant to historical investigation as historical fact is to legal decisions. The lawyer is bound by judicial decisions which are more important than evidence; the historian is free. A judge can make law in a sense in which the historian cannot make history. It might indeed be contended that historians have been responsible for not less fiction than the courts of law; but there is a difference. The fiction of the courts becomes a binding law; the fiction of the historian only entertains the student. It is only when history is merged in theology that pontifical utterances are considered decisive of historical problems. It is not the historian's function to wear the black cap or to speak

ex cathedra; his opinion constitutes neither a sentence nor a dogma, and there are no penalties for contempt of court.

The fictions of the courts and of the crown are much more serious matters. *Solus princeps,* runs a legal maxim, *fingit quod in rei veritate non est;*[1] supreme capacity for fiction is an attribute of sovereign power. Sometimes it seems more like the last resort of weakness, and some of the fictions of the crown have proved an ever-present help in time of trouble. Such were the rules that an allegation of the crown could not be traversed, and that only those things were "records" which the crown could call to mind. The memory of the crown became the evidence for the fact. But it had in time to share its privileges with the peers and to acquiesce in the distribution of its sovereign power; and peerage law is not a fiction of the crown, but the invention of the house of lords.

None of the lords' decisions have, however, summed up quite so briefly so much absurdity as the popular phrase "blue blood." It would hardly be worth while examining the fantastic implications of this expression of the theory of peerage, had it not been seriously defended by the latest historian of the house of lords, who writes with intimate knowledge of many aspects of peerage history. "The doctrine," says Mr. Pike,[2] "is no absurdity at all, but one which is perfectly intelligible, perfectly consistent with itself at all points, and as scientific as anything to be found in medieval or modern literature." Neither medieval nor modern literature is perhaps the place to look for science, and it may be that this pronouncement is not intended to be so portentous as it appears. The obvious criticism, that the blood of the younger sons of a peer is just as blue as that of their eldest brother, and yet does not make them peers, is met by the explanation that the doctrine of blue blood, properly understood, does not mean that blueness of blood in itself made its fortunate possessor a peer, but makes him capable of inheriting a peerage. This may be

[1] Maitland, *Collected Papers,* iii. 310.
[2] *Const. History of the House of Lords,* pp. 141 *sqq.*

comforting to a considerable number of Englishmen; for there are some thousands of living descendants of our kings;[1] and there must be hundreds of thousands descended from the younger sons of peers. They are commoners none the less, and the blueness of their blood gives them no legal or political distinction whatsoever. If this is all that is meant by this perfectly scientific doctrine, it has nothing to do with peerage. For there is no mistake about a peer; the legal and political distinctions between him and a commoner are clear and sharp enough, and they can be acquired without any pretence to blueness of blood. Moreover, in the middle ages the husband of a peeress in her own right, although himself a commoner, was often summoned by special writ to parliaments. Mr. Pike himself quotes the case of Ralph de Monthermer, who was summoned as Earl of Gloucester and Hereford in the right of his wife, but lost to her son the right to be summoned when that son came of age.[2] He seems to have enjoyed that strange anomaly, a temporary lease of blueness of blood! Into such vagaries can people be betrayed by mixing a physiological term like blood with law and politics. Titles to peerage have been decided, not by blueness of blood, but by royal writs and judicial decisions. If it pleases people to think that their blood was turned blue by a writ of summons or letters patent, and made red again by attainder, there is no harm in the superstition; but it need not concern the student of the history of the peerage.

There are two serious problems to be considered. Firstly, what is "peerage," and how did it develop? And secondly, how did it come to enjoy its present position in parliament? The two are distinct questions, for there is no necessary connexion between peers and parliaments, at any rate not in the modern sense of the peerage. But the word itself has passed through the whole gamut of meaning, from its

[1] See Joseph Foster, *The Royal Lineage of our Noble and Gentle Families*, 1883.

[2] Elsynge, *Modus*, pp. 39, 55; Pike, *Const. History of the House of Lords*, pp. 70–2. He was subsequently summoned as Baron Monthermer in his own right.

etymological sense of "equal" to its modern implications of privilege. In the earliest Anglo-Norman legal terminology it simply denoted equality. Co-heiresses were said to be *pares* in respect of their father's inheritance, because all inherited equal shares; a villein was described as the "peer" of other villeins holding of the same lord. There were, in fact, all sorts of peers; we read of "peers of the county," and "peers of the borough"; Valenciennes had twelve peers, so had Lille, and Rouen had a hundred in the time of King John.[1] The *Modus Tenendi Parliamentum* implies that every member of a parliament was a peer, by dividing the whole assembly into *sex gradus parium*, clerical proctors, knights, and burgesses, as well as prelates and magnates.

But even before the Norman Conquest a limitation begins to be attached to the meaning of "peer" on the continent, a limitation arising out of its frequent association with the words *judicium* and *judicare*. Under Charles the Bald in 856 and Conrad the Salic in 1037 we find it stated that men are to be judged *per pares suos* or *secundum judicium parium suorum*,[2] and in England from Henry I to Magna Carta we have constant references to the principle *quisque judicandus est per pares suos et ejusdem provinciæ*. Peer, baron, and judge come to be used as almost synonymous terms, though while a vassal speaks of his "peers" the king speaks of his "barons," because the king has no peer in his kingdom. By this time only those are peers who are equal to judgement, and this excludes the majority; *villani vero*, Glanvill tells us, *non sunt inter legum judices numerandi*.[3] This is the meaning of "peers" at the time of Magna Carta. The idea that *judicium parium* in that famous document meant trial by jury has been too often exploded to need further comment.[4] But it is material to our purpose to point out that judgement by one's equals meant that one was not to be judged by inferiors; it did not in the least mean

[1] L. Vernon Harcourt, *His Grace the Steward and Trial by Peers*, pp. 226–7.
[2] *Ibid.*, pp. 205–6.
[3] *Ibid.*, p. 207.
Cf. McKechnie, *Magna Carta*, 1905, pp. 158–63, 456–8.

that one was not to be judged by superiors.[1] Our criminals are not the peers of our judges; and every lord of a manor could judge his villeins.

The "peers" are thus already a privileged class; they possess the right to be judged by their fellow-vassals in the king's court, and the right to judge their villeins in their own.[2] They are also becoming hereditary, for these privileges are always attached to the tenure of land, and the tenure of land, though at first a mere life interest conditioned by service, grows more and more into irresponsible property. This process was accelerated by the creation of strict entails under Edward I. Estates now passed from father to son by right of heredity, and with the estates the privilege of exercising judgement, which seems to be the essential factor in peerage. By the end of Edward's reign England may fairly be said to have had an hereditary peerage.

But this peerage has as yet little to do with parliament. There are many hundreds, possibly thousands, of these "pares," but Edward I summons less than a hundred magnates by special writ to parliament. Those who sit in parliament have no hereditary claim to do so. The word "peer" does not occur in the "Rolls of Parliaments" for his reign, and it is not mentioned in his writs. It does not entitle any one to a special writ of summons, though probably every "peer" was either summoned in person or included among those from whom the sheriff required obedience to the general writs. But the "peers" still numbered their thousands, and included the lesser as well as the greater barons. It is clear, however, that the process of limitation, begun by the restriction of "peerage" to those who could "judge," was proceeding apace in the thirteenth century; and the problem is to bridge the gulf between the numbers of "peers" entitled by Magna Carta to judge and be judged by their equals, and the smaller but still indefinite

[1] "Assisiæ vero tenentur per barones et legales homines. Par per parem judicari debet; barones igitur et milites, legis statuta scientes et Deum timentes possunt judicare unus alium et subditum eis populum; rustico enim non licet, vel aliis de populo, militem vel clericum judicare" (Glanvill; cf. Pollock and Maitland, i. 173; Vernon Harcourt, pp. 207, 214; *History*, April, 1920, pp. 33–5).

[2] Elsynge, *Modus*, p. 9.

number of "peers" who develop into a parliamentary force under Edward II. The question is closely connected with the change in the *magnum concilium*. By what process were the thousands of tenants-in-chief, presumed to have gathered on Salisbury Plain in 1086, reduced to the "magnates" who gathered at Oxford in 1258? Or, in other words, how was the line drawn between the greater barons entitled by Magna Carta to a special writ and the lesser barons summoned in general through the sheriff? For it is clear that the term *pares* tends to be restricted to the greater barons; and the same question might be put in yet another form: what is the social and legal difference between one who holds a barony and one who simply holds by barony, or between one who holds *per baroniam* and one who holds *per servitium militare?* The answer to any one of these questions should supply answers to all the others; for the holder of a barony receives a special writ of summons, becomes a magnate and then a modern peer. Even those who hold, not *baronias integras*, but *per baroniam*, are liable to the summons; for, whatever "barony" may have been, it implied a special jurisdiction and a special obligation to the crown which conferred it.

Now it is obvious that the thousands who took the Sarum oath to William the Conqueror did not all hold baronies, and it may be doubted whether any definition of a barony had yet been evolved.[1] But they were all the king's men, his barons, and they held their lands in chief by military service. The lands might be great or they might be small; the extent would not affect the nature of the tenure, but it would affect the political value and importance of the tenant. Before long there is a distinction between barons and knights;[2] both hold by the same military tenure-in-chief, but some are the king's barons, while others are only

[1] Cf. Elsynge, p. 51.

[2] The term "miles" or "knight" is here used in its feudal sense, in which it implied tenure by military service. Later on, in the days of chivalry, it became a *nomen et honor*, conferring a military and social distinction without any reference to the tenure of land, just as, in still later days, "peerages" came to be created without any reference to tenure-in-chief of the crown. Barons were even knighted, so completely did the idea supersede the feudal principle.

knights. Later there is a further distinction among the barons themselves; some are greater and some are less, and the lesser barons are lost among the knights. By the time that the *Modus* is compiled, a rule has been elaborated by the king's exchequer to distinguish barons from knights; the baron is the holder of a barony, and a barony is thirteen and one-third knights' fiefs.[1] Now a knight's fee is calculated at five hides, and if a barony was thirteen and a third times as much, it was two-thirds of a hundred hides. It is merely a guess that such an extent of land may have entitled a barony to be regarded as a private hundred possessing the jurisdiction usually connected with that unit of organization. But it does not appear entirely fanciful to conjecture that the individual holder of extensive lands was regarded as being entitled to special immunities, such as the right to exclude the sheriff from his barony, and exemption for himself and his tenants from attendance at the shire court, just as individual boroughs in later times achieved the status of counties. These and greater privileges had been granted to the earlier "honours," but from 1176, when Henry II insisted that no "honour" should exclude the royal judges, there is said to have been little distinction between an "honour" and a barony; and it is probable that these two kinds of "liberty" or "franchise" approximated. For baronies tended to be reduced in number and increased in size and dignity. Some fell into abeyance between co-heiresses; others were accumulated in single hands by marriage and inheritance. The process which concentrated five earldoms in the hands of Thomas of Lancaster operated also in the case of baronies.

Now, while the grant of immunity from the shire court would not prevent the baron from attending if he chose, frequent complaints in the thirteenth century of the difficulty of holding shire courts owing to the number of "liberties" granted by the king[2] indicate that voluntary attendance

[1] Stubbs, *Charters*, 1900, p. 503.

[2] In the "Petition of the Barons," presented at Oxford in 1258, they complain of the difficulty of taking grand assizes owing to the numerous exemptions granted to knights by the king (§ 28), while they (§ 17) attack the sheriffs for requiring the personal attendance of the earls and barons.

was rare; and a rough division of labour and liability seems to have been in practice established. Lesser barons, who had to attend the shire court, were only summoned by a general writ to Westminster, the practical effect of which was probably a licence to stay away, and afterwards they were permitted to excuse themselves by sending a couple of representatives. But the greater barons, who escaped the duties of the shire court, were at least liable to a special writ of summons to parliament; and it is probable that the divergence between knights and barons which had so powerful an effect upon the organization and growth of parliament, had its root in an earlier separation in the shires. The barons held aloof from the local business of the people, while the knights busied themselves with its conduct; and habits of co-operation and of management contracted in the shires were perpetuated in the national business of parliament.

Whatever its cause and method of operation, this discrimination between greater and lesser barons effected a change in the *magnum concilium*. If that name is properly applied to the concourse on Salisbury Plain, the adjective clearly applies to the numbers who attended, and not to their individual greatness. For baron at first means nothing but "man"; and *baron et femme* is the regular Norman-French for "man and wife." But in process of time the *magnum concilium* became a small gathering of great men rather than a great gathering of small men. Greatness, not tenure-in-chief, constitutes the right or the liability to a special writ of summons to the *magnum concilium*, which in the reigns of Henry III and Edward II seems to have been a council of magnates. It is significant that during the interval of Edward I's strong rule, the adjective disappears from the council. His council is a royal and not an oligarchic council; its personnel depends upon royal writs and not upon feudal privilege, and attendance is a matter of obligation and not of right. But the idea of right has grown up in resistance to the centralizing policy of Henry II, the tyranny of John, and the alien misgovernment of Henry III; and it is only for a time that Edward I can check the aristocratic claims of the greater barons to limit the royal authority

and participate in the control of national affairs. The contest centres round the council, its composition, and its powers. Is it to be a council of magnates based on baronial rights, or a council of royal advisers dependent upon the crown? This is the issue between Edward II and Thomas of Lancaster, and it is during that struggle that peerage makes its *début* as a constitutional force in parliament.

Naturally it sought to base itself upon precedent, and the *judicium parium* of Magna Carta formed a considerable part of the political stock-in-trade of the baronial party. They appealed to it as to fundamental law, which bound the high court of parliament itself; a judgement or act which contravened Magna Carta was regarded as *ipso facto* void.[1] But every political party falsifies history in its appeal to precedent, and the *judicium parium* of Magna Carta was magnified and transformed under the stress of political exigencies into a new political principle. Its germ may no doubt be found in Magna Carta, and even in 1215 there may have been more in the minds of the barons who talked about judgement by peers than its purely legal application. Without plunging into the vortex of the discussion, which has vexed courts of law as well as historians, about the meaning of *vel* in the famous phrase of Magna Carta,[2] *per judicium parium suorum vel per legem terræ*, we may perhaps indicate a preference for the disjunctive interpretation, and hold that in the minds of the barons there was a clear and important antithesis between *lex terræ*—the custom of the country—and *judicium parium*—a more or less novel royal expedient or baronial safeguard.[3] Henry II had invented or applied

[1] Edward I's *Confirmatio Cartarum* declared void all future judgements against Magna Carta, and the declaration was repeated in Stat. 42 Ed. III, c. 1 (1368).

[2] Cf. McKechnie, *Magna Carta*, pp. 442–3; Vernon Harcourt, p. 224; Pollock and Maitland, i. 152 *n*. It may not be presumptuous to remark that *vel* is always disjunctive, but that sometimes it differentiates things and sometimes only words. That does not, however, help us with *judicium parium vel lex terræ*, because the whole dispute is whether those are two different things or merely two descriptions of the same.

[3] While *lex* is the custom of the country, a *judicium* is a particular sentence or "doom," and "doom" is perhaps the best translation; doomsday is the day of judgement. The ordeal and trial by battle were parts of the *lex*, but the result of any particular ordeal or combat would be a *judicium*.

to England a number of new-fangled legal methods which were certainly no part of the customary law of the land; and one at least of the motives of Magna Carta was to protect the barons against the abuse, if not also against the use of Henry II's expedients. The ancient laws or customs the barons did not impugn, but they would have none of these novel *judicia* except with their consent. The crown was not to be free to devise judicial methods and enforce them by judges who were no better than royal servants; if there were to be innovations, the barons must consent to their institution or at least participate in their application.

A case in the reign of Edward I may illustrate their point of view. A baron objected to the king's judges that they were not proceeding against him *per legem terræ;* the judges admitted the fact, but thought it no bar to their action. They were proceeding by royal mandate, *per speciale mandatum regis*, we might say in later legal language.[1] It was to bar such proceedings that the principle of *judicium parium* expanded with the growth of royal jurisdiction. The crown was ever pronouncing new decisions, and chancery devising novel writs.[2] These things were no part of the *lex;* they were therefore not to be done except *per judicium parium.* Even acts of parliament were not *leges*, but the *judicia* of a court. The law was begetting politics, and the privilege of peerage overflowed from the one sphere into the other. The invasion was all the more easy because the frontiers had not yet been fixed; a resolution of the king in council to make war on a vassal was a *judicium super eum ire,*[3] and every legislative act was also a *judicium. Judicium parium* was a principle that might be applied in every sphere of public affairs, and the veto of the house of lords has a pedigree stretching back to Magna Carta.

But the more widely the principle was extended, the

[1] Vernon Harcourt, pp. 281, 301; but the phrase is used in Edward III's reign (*Rot. Parl.*, ii. 266).

[2] Maitland (*Collected Papers*, ii. 155) mentions the existence of 471 different kinds of original writs in Edward I's reign, compared with fifty or sixty in 1227.

[3] Vernon Harcourt, p. 248.

narrower grew the class which benefited by its operation. The *pares* of Magna Carta may have been few compared with the total population, but they were a multitude compared with the peers by whom and in whose interests Edward II was to be deprived of royal authority. The reign of Edward I was treated as an interlude, and the barons reverted to the interregnum of the Barons' Wars. But they had no Simon de Montfort among them, and showed no desire to share their counsels with knights of the shire or burgesses. They had, however, some notions of their own which had not occurred to authors of the Provisions of Oxford; and it is at this crisis that we first read about peers "de la terre" used in a sense somewhat nearer to its modern signification than the *pares* of Magna Carta.

The phrase is stated to have first been used in 1322 in the charges of "the prelates, earls, and barons, and the other peers of the land and the commons of the realm" against the two Despencers.[1] But there is an earlier instance of the use of the phrase in the indenture drawn up between Edward II and Lancaster at Leake in August 1318.[2] This agreement provides for the attendance at council of two bishops, one earl, a baron, and a banneret of Lancaster's household, on Lancaster's behalf, and stipulates that if the earl's representatives disagreed with any resolution of the council, *soit tenuz por nient et adresce en parlement par agard des pieres, et totes choses convenables soient redressez par eux.* The later reference lays a good deal of stress on the *pieres de la terre;* the phrase occurs five times in the document. Judgement by peers is no longer a mere protection against the legal innovations of the crown; it has been erected into the principle that they are to judge the acts of the crown and its ministers. Impeachment already looms upon the horizon.

[1] Pike, p. 157, citing the Close Roll of 14 Edward II, membrane 14, printed in *Statutes of the Realm*, i. 181–4. The fourteenth year of Edward II, however, ran from July 1320 to July 1321.

[2] *Rot. Parl.*, i. 453–5. The entry runs "escrit a Leek le ix jour d'Augst l'an du regne du dit Roi Edward duzieme," and it was read and examined at the York parliament of Oct. 1318. The entry is printed in the *Rot. Parl.* from the Close Roll of 12 Ed. II, m. 22 dorso.

This use of the word "peers" in the reign of Edward II is limited to the Lancastrians; no royal clerk or royalist partisan seems to employ it, and it obviously expresses a political theory held by the opposition. Its adoption by Lancaster in the proceedings against the Despencers recalls the insistence by the Lords Ordainers upon the "baronage" in their attacks upon Gaveston.[1] Peerage is a principle used to support the magnates in resistance to the crown, and *par agard des pieres* takes in 1318–22 the place of the *par agard del baronage* of 1311. It was naturally selected by the opposition because the "peers" had grown to be independent of the king; they could hardly pretend to independence so long as they were tenants-at-will of the crown and called themselves barons. But hereditary tendencies culminating in strict entails had rendered the lords of the land secure; and lords, seigneurs, barons, and peers of the land come to be used as synonymous terms to express a landed aristocracy striving for political supremacy. Their claims reach their high-water mark in the ordinances of 1311. The king is not to leave the realm, declare war, appoint judges or ministers, keepers of castles or wardens of ports without the assent of his baronage; and the royal authority is put in commission among the "peers."

But we are still some distance from the modern peerage, and even when clerks of chancery are constrained to write of peers in Edward III's reign they leave a very vague impression of the meaning of the word. That it was not the modern meaning is clear from the most cursory inspection of the "Rolls of Parliaments" wherein the clerk often writes of "prelates, earls, barons, and their peers," but never limits the peers to prelates, earls, and barons.[2] The vagueness of the phrase is illustrated by the fact that it was possible for a not unlearned clerk of the parliaments in the seventeenth century to maintain that the peers of the realm were not the earls or barons, but the bannerets, who were not infre-

[1] *Rot. Parl.*, i. 281 ff.

[2] Cf. *Rot. Parl.*, ii. 53: "Lesqueux countes, barouns, et peres," and "peres, countes, et barouns."

quently summoned by special writs to parliament.[1] This introduces an unwarrantable precision into the terminology of the fourteenth century, but there is no doubt that bannerets were included in the category of those who are described as peers of the prelates, earls, and barons. Earls and barons were peers, but others were peers as well,[2] and the clearest indication of who these others were is afforded by the grant, in January 1339–40, of a tenth to the king by the earls and barons for themselves and for their peers of the land who hold by barony.[3] Just as in Anglo-Saxon times there were men who were "thegnworthy" without being thegns, so in the fourteenth century there were men who, without being earls or barons, were their peers. From a passage in the *Modus* we might infer that this line of peerage was determined by the possession of thirteen and a third knights' fees;[4] but the inference would not be safe. There are instances of men possessing less than a single knight's fee being summoned by special writ to parliament, and before long Richard II will create peers by letters patent without any reference to the lands they hold. In any case this peerage constituted a liability rather than a right; and just as the tenure of a ha'porth of land, as Bracton says,[5] by military tenure rendered the tenant liable to feudal incidents, so it rendered him liable to a special writ of summons to the king's high court. It gave him no right to such a summons; but if it were sent, he could not disobey unless he could prove that he held no land *per baroniam*.[6]

[1] H. Elsynge, *The Manner of Holding Parliaments*, ed. 1768, pp. 43–8, 79. Selden (*Judicature in Parliaments*, p. 159) writes of earls, barons, and "baronets" assembled in the parliament of 1386; and the roll of 1513 has "every other baron, baronet, and baroness" (*Lords' Journals*, i. p. xxvi.), where baronet seems to be the eldest son of a baron. For other uses and the confusion of banneret and baronet, see *N. E. D.*

[2] Earls, barons, and peers are all summarily referred to (*Rot. Parl.*, ii. 53) as "lesdits peres."

[3] *Ibid.*, ii. 107.

[4] Stubbs, *Charters*, p. 503: "item summoneri et venire debent omnes et singuli comites et barones *et eorum pares*, scilicet illi qui habent . . . tresdecim feoda et tertiam partem unius feodi militis." The poet Spenser thought these *pares* of the earls and barons were baronets; see *N. E. D.*, s.v. "Baronet."

[5] Pollock and Maitland, i. 257.

[6] *Rot. Parl.*, ii. 132, 139. Nevertheless, recipients of special writs of summons did occasionally claim exemption on the ground that they held, not a barony, but only *per baroniam*.

There were, therefore, many peers, but not every one who called himself a peer was called to parliament. Nor is the word officially used as a normal description of those who received a special writ of summons. Its correct employment is with reference to judicial proceedings, to trial by peers of their equals. It is then that the peers most insist on their peerage; as peers they are there in the king's high court for judicial purposes only. When political matters are under discussion, it is not as peers that they act, but as lords of the council in parliament, and they are described as prelates, earls, barons *et autres grantz* or magnates. The king still holds his court in his council in his parliaments; its duties are multifarious, and so are the parts of its members. When they sit in judgement they act as peers, when they advise the crown in matters of administration they are councillors, and in time both these functions will be obscured by their third capacity as legislators. This is not the view of the "peers" themselves. In their own eyes they are peers above everything; and in all their petitions, whatever their purport, they call themselves "peers." They speak of the statutes made by the king, peers, and the commons;[1] they demand that the chancellor and the treasurer should always be "peers." They won in the end, but it is not until after the close of the middle ages that "peers" became a regular term for the lords in parliament; and it never became a correct and exhaustive description of those who sat in the house of lords.

Nor did the use of the term in the least imply that even when trial of peers was the business of parliament, any peer had a right to be present. Some peers must participate in order to make the trial a trial by peers; and presumably all the "peers" who had received a special writ to a parliament were entitled to sit when parliament tried a peer. These peers gradually, too, asserted the principle that no one who was not a peer, even though he had received a special writ, was entitled to judge a peer. The prelates ceased to take part in judicial proceedings, not so much

[1] *Rot. Parl.*, ii. 140.

perhaps because their "peerage" was doubtful as because their holy orders forbade the shedding of blood; and the trial of peers in parliament was always on capital charges. The exclusion of the judges, or rather their reduction to the position of assistant advisers without a vote, substantiated the old claim of the barons that the king's judges and barons of the exchequer were not their peers and could not judge them. But the old claim was vastly extended; and the inferiority of the judges, admitted when the lords sat to try their peers, was also enforced by degrees when the lords sat in their other capacities, as a council and as a house of parliament. The fact that the judges could not perform one of the functions of the king's court in his council in parliaments was eventually held to debar them from performing the others; and ultimately the principle that a man should only be tried by his peers was distorted into the notion that peers, and peers only, could vote in the house of lords. By a like perversion the trial of men by *their* peers sometimes became their trial by *the* peers. This was not an infringement of Magna Carta, because none of its clauses forbade trial by one's superiors. The peers' jurisdiction, too, was limited to crimes against Magna Carta.[1] But even with this limitation their claim was a usurpation. It is true that in 1330 they protested that as peers they were not bound to try Simon Burford, who was not their peer. Yet as "judges of the parliament" they, with the assent of the king, sentenced him also as a traitor.[2] This, they admit, was against the law, and ultimately it was established that the participation of the commons as the grand inquest of the nation was essential to the trial of commoners by the peers and to their condemnation by act of attainder.[3]

[1] In 1311 the Ordinances also included the Confirmation of the Charters and the Ordinances themselves among the laws, the breach of which was to be tried by the barons in parliament; and in 1341 the peers wanted to include the "liberties of holy church" and the Charter of the Forests (*Rot. Parl.*, i. 285, ii. 126).

[2] *Rot. Parl.*, ii. 53*b*.

[3] *Year Book*, 4 Henry VII, p. 18: "en le parlement le roy voule que un tiel soit attaint et perde ses terres, et les seigneurs assentent, et rien fuit parle des comons. Purquoi touts les justices tenent clerement que ceo ne fuit acte. Purquoi il fuit restore," etc.

We are still, however, far from a house of lords in the reign of Edward III, and the lords of parliament are still for the most part lords of the council. But the reign of Edward II had permanent effects upon the constitution, and Edward III never reduced the magnates to their insignificance under Edward I. The "Rolls" are replete with references to the *magnum concilium*, which has entrenched itself in the heart of parliament, and the "council" which the king holds in his parliaments is now the *magnum concilium;* the *camera magni concilii* has become the "parliament chamber." The process is very obscure, but one or two points emerge. It is clear that the magnates have mastered the council. In 1315 parliamentary pleas are held *coram magno concilio*, and answers are given *coram rege et magno concilio*, instead of *coram concilio*, as in the reign of Edward I. In the following year the chancellor, judges, and other members of the council report to the king *quod non audebant dictum negotium diffinire nec eidem domino regi super hoc consulere sine assensu magnatum de regno propter difficultatem et raritatem negotii supradicti;* and they recommended its reference to either a parliament or a *convocatio magnatum de regno*.[1] "Great councils" continued to be summoned for centuries after the organization of the Model Parliament, and they were a favourite expedient with the Lancastrians.[2] But here we are concerned with "the king's great council in parliament"[3] which gave its name to the "parliament chamber," and eventually became the house of lords.

That it is still primarily a king's council is clear from the facts that no principle upon which a "peer" could claim a right to be summoned had been established. Indeed, there seems to be no instance in the middle ages of any one claiming a right to be summoned at all; and it cannot be

[1] *Rot. Parl.*, i. 354*a*.

[2] See Nicolas, *Proc. of Privy Council*, i. 17, 102, 144, 156, ii. 85–9, 156, iv. 105, 185–6, 225, v. 64, 108, vi. 214, 290, 298, 333, 339. Their object was often probouleutic, such as to decide whether or not a parliament should be called. But in the fifteenth century they were not confined to magnates; about half the prelates, earls, and barons summoned to parliament were usually summoned to a great council, but sometimes they were reinforced by half a dozen knights or esquires from each county (*ibid.*, i. 156).

[3] *Ibid.*, iv. 185.

too often emphasized that even to-day peerage does not in itself constitute a right to sit and vote in the house of lords; it has been held to constitute a right to a summons, but it is the writ of summons that constitutes the title to sit and vote, and in the middle ages the issue of this writ was a matter within the discretion of the crown. The reason why some abbots sit and others do not is simply that it has become the custom of chancery to summon one and not the other. The abbot who is not summoned never dreams of claiming a summons; he has no right to a summons, and a baron is in the same position. A mere glance at the number of those who were summoned at different times will show that the receipt of a writ depended upon the discretion or caprice of the crown and not upon hereditary right.[1] To the parliament of 1295 Edward I summoned forty-one barons, to that of 1300 he summoned ninety-nine. To the parliament of 1321 Edward II summoned ninety, to that of 1322 he summoned fifty-two. To the parliament of 1333–4 Edward III summoned sixty-three barons, to that of 1346–7 he summoned only thirty, but to that of 1347–8 he summoned fifty-six. No natural cause like that of death will explain these violent fluctuations; and the barons who received a special writ of summons under Edward I and Edward II were not reduced to half their number by extinction of their heirs. Whatever the house of lords may, in defiance of history, have made law in the nineteenth century, there was no idea in the fourteenth or fifteenth that a baron summoned to one parliament must needs be called to another, or that a writ of summons created a "peerage" transmissible by descent. A peerage, indeed, is not a term which a medieval lawyer would have understood;[2] he knew that an earldom meant an office, the tenure of which always involved a special writ of summons to parlia-

[1] Palgrave's published *Parliamentary Writs* only cover the reigns of Edward I and Edward II, but his MS. lists, preserved in the Public Record Office, go on into the fifteenth century; cf. Maitland, *Memoranda*, p. xxxv; and Pike, pp. 96–100. For later lists of "peers" summoned see 47th *Report of the Deputy-Keeper of the Records*, pp. 79–83.

[2] Murray's *N. E. D.* gives no instance earlier than 1671 of the use of the word to indicate a dignity; nor is "the peerage," meaning the body of peers, found before 1454.

ment; he believed that a barony meant the tenure-in-chief of an amount of land, or more probably rights of jurisdiction, if not an office, which involved at least a liability to that summons. But in the reign of Charles II it was decided that the tenure of a barony did not involve the possession of a "peerage" or a right to a special writ of summons to parliament;[1] and assuredly no such right existed in the middle ages. There were many heirs in Edward III's reign of barons summoned by special writ to parliament under Edward I or Edward II, who received no writ of summons themselves and never thought of claiming it as a right.[2] The law of "peerage" is a modern monument of legal fiction. At the end of the middle ages Fortescue talks enough about lords spiritual and temporal, but he never calls them peers, and the word does not occur in the "Rolls of Parliaments" for the reign of Henry VII, or in the "Journals" for several succeeding reigns. Nor does Sir Thomas Smith, who wrote under Elizabeth, use the term. Peerage had been a juridical concept in Magna Carta; under Edward II it was turned by a limited class to political purposes; but the vogue of hereditary peerage as a foundation of the constitution is a modern growth born of antagonism to Stuart and then to democratic principles. To Fortescue the barons are not an independent "peerage," but councillors of the crown, bound to give advice when asked, but not entitled to enforce it.

It is easy, too, to exaggerate the meaning of *natus* in Fortescue's statement that the lords are *consiliarii nati* to the king; for he expressly includes lords spiritual as well as temporal, and every archbishop of Canterbury and of York was *legatus natus* of the pope. It is clear that a lord spiritual was not a councillor of the crown, nor the archbishop legate of the pope, by hereditary right; and Fortescue's statement that the lords are councillors "by

[1] Cruise, *Dignities*, 2nd ed., p. 66; the question was not, however, finally settled until the Berkeley peerage case in 1861; see below, p. 307 *n*.

[2] For instance the Ughtreds (*D. N. B.*, lviii. 16*a*), Umfravilles (*D. N. B.*, lviii. 23*b*), Dynhams (G. E. C.'s *Complete Peerage*, ed. Gibbs, iv. 371–9). Not a few of these "peers" of modern theory acted as sheriffs or sat in the house of commons.

reason of their baronies and estates," clearly implies that they are councillors in virtue of their feudal relation to the king and not of their blood relation to their ancestors. The barony, indeed, has become hereditary, but the bishopric has not, and the bishop or archbishop is just as much *consiliarius natus* or *legatus natus* as the baron. The right or the duty to give counsel seems to be innate in the dignity rather than in the individual or in the blood; the spiritual lord ceased to be *consiliarius natus* when he resigned his bishopric and the temporal lord when he lost his barony. Ralph de Monthermer became *consiliarius natus* when he married the Countess of Gloucester and ceased to be such when her son came of age.

Nevertheless, the barons, who in the reign of Henry III had merely claimed to be the king's "natural" councillors, as distinguished from unnatural aliens,[1] begin in time to claim, as "hereditary" councillors, an indefeasible right to a seat in parliament. The mere routine of chancery clerks tended to stereotype a list of barons to whom a special writ was sent. It was easier for officials to address the writs as before than to pick and choose. They could hardly vary the list of barons or abbots, whom it was usual to summon, on their own authority; and even the strongest kings developed a respect for chancery forms. Chancery, too, was further removed by the growth of the privy seal from the caprice of the crown; and when a Tudor required the absence of a lord from parliament, it was secured, not by withholding the writ of summons issued under the great seal of chancery, but by a more intimate injunction, under the privy seal or signet, not to obey it. From the third Edward to the third Richard, however, kings were concerned to secure the presence rather than the absence of their councillors in parliament. A crowded council betokened a vigorous government, and the lack of Lancastrian governance was betrayed by the absence of lords from the council in and out of parliament. Richard II imposed heavy fines on

[1] An alien, even though he held an English earldom, was not a *consiliarius natus* of the crown; see below, p. 273 n.

absentees,[1] and the dwindling number of barons summoned to parliament was due to the inability of the crown to enforce, and to the reluctance of the lords to meet, the obligation of suit and service at the king's high court. In 1433 the crown could only extort even from its chief councillors an undertaking to attend the council *non tamen continue sed saltem tempore curiae.*[2] Their ambition was not to sit as lords of council or of parliament at Westminster, but to rule as princes in the provinces; a special writ of summons to parliament added nothing to the prestige of a Neville or a Percy, and threatened an irksome distraction from more local and more congenial occupations.

It was not for the writs of summons attached thereunto that these lords of misrule sought dukedoms, marquisates, earldoms, viscountcies, and baronies, but for the lands, pensions, and other grants which accompanied the conferment of these dignities.[3] A seat in parliament only became an object of ambition when parliament itself became a seat of authority; and in the fifteenth century a writ of summons was merely a disagreeable incident to baronial dignity. It was, however, becoming hereditary because strict entails had made baronial tenure hereditary, and writs of summons had become attached by custom to greater baronies. This association seemed to the crown to portend a baronial tyranny; it tended to restrict the king's choice of counsellors, because no one could be disseised of his barony save by the judgement of his peers, and the *personnel* of the king's great council was thus determined by them and not by the sovereign they were to advise.[4] The more rigid the custom grew of sending writs to the earls and greater barons, the less scope there was for the crown to summon others outside the limited

[1] Pike, p. 237. [2] *Rot. Parl.*, iv. 446.

[3] It was the rule then for aspirants to receive and not to make payments for their dignities.

[4] The loss of control over the great council was one of the causes which led kings to develop a privy council immune from the limitations of baronial and hereditary tenure, in somewhat the same way as the independence of chancery, due to the growth of tradition and custom, led them to devise the more intimate and personal machinery of the privy seal and signet.

circle of territorial magnates. Richard II was naturally the first to find this limitation intolerable, and it was probably to escape it that he began the practice of creating barons and other peers by patent without reference to the lands they held. This practice saved the crown from a danger similar to that which was threatened by the peerage bill of 1719; it could create peers without being limited in its choice to the holders of great estates.

But the association of land tenure, and consequently of the hereditary principle, with peerage had been too long established to be eliminated; the baron created by patent was usually granted lands to support his dignity, and even to-day, when he is less fortunate, he commonly takes a territorial title. Nor did the creation of peers bring lasting advantage to the crown: the new peer might be subservient to his creator, but his descendants had no such attachment to his creator's successors. The patents of Richard II and his successors asserted the principle of heredity against the implications of the writ of summons, for they were made out to the recipient and his heirs male, whereas writs of summons ignored the recipient's heirs altogether, and the transmission to heirs general has been a matter of judicial fiction. But the notion of councillorship is emphasized by the limitation of patents to heirs male. Lands might descend to females, but only males could counsel the crown. Nor is it certain that the creation of a barony, viscounty, marquisate, or dukedom by letters patent committed the king, and still less his successors, to the perennial issue of parliamentary writs of summons to the newly-created peer and to his heirs. Kings were jealous of circumscribing their discretion; even a statute, it was contended as late as the seventeenth century, made by one king did not bind his successors.[1] Letters patent were certainly not more binding than a statute, and they contained nothing about writs of

[1] Prothero, *Select Documents*, ed. 1898, p. 340. Baron Clarke's argument in Bates' case: "The statute (45 Ed. III, c. 4) extends only to the king himself, and shall not bind his successors, for it is a principal part of the crown of England, which the king cannot diminish."

summons, the right to which was by later generations read into the patent of creation.

These patents did, however, create hereditary dignities[1] to which a writ of summons to parliament came in common practice to be attached; and the development or perversion of the king's council in parliament into an hereditary house of lords is mysteriously connected with the growth of heraldry, which characterized the decline of the middle ages. The incorporation of the College of Arms by Richard III, the passion for pedigrees, the heralds' visitations, and the granting of arms (when they were losing their practical value) were all manifestations of a social evolution, the political and constitutional effects of which have not been properly explored. There is no mention of Garter king-of-arms[2] in any version of the *Modus Tenendi Parliamentum*, not even in that which the clerk of the parliaments prefixed to the *Journal* for 1510; but he figures largely in the pictures of parliament which date from the sixteenth century, and his functions were important. He preceded the newly-created peer when he came to take his seat, and presented his letters patent;[3] and Burghley once moved Garter's appointment to a committee of lords to determine questions of precedence.[4] Pedigrees, too, were recorded on the first writs of summons issued to peers on succession, and came to be regarded as an indefeasible title to the writ. The obsequiousness of the lords in parliament after the Wars of the Roses and the reduction of the prelates by Henry VIII blinded the Tudors to the growth of a strictly hereditary peerage which ultimately turned the tables on the crown.

The vogue of the phrase "hereditary peerage" involves,

[1] I have some doubts about the correctness of this customary phraseology. The dignity was created by the crown, and the letters patent were, like proclamations, merely the evidence of the fact and not the fact itself. The act was, moreover, often done by the crown in parliament; and it seems to have been merely an accident that these acts did not permanently become acts of parliament.

[2] First created, it is said, by Henry V.

[3] Elsynge, pp. 6, 8, 97–8.

[4] Townshend, *Historical Collections*, p. 83. The intrusion of Garter king into the high court of parliament is a portent of the subversion of the king's great council in parliament by the modern peerage.

however, some confusion of thought. The essence of the house of lords is not that it is based upon the principle of heredity like the old nobility of the continent, but upon the principle of primogeniture, which as the foundation of a legislative chamber was peculiar to England. There is a great deal of physiological truth underlying the current phrases about "good old stock," "in the blood," and so forth; but hereditary virtues have a trick of eluding eldest sons. There have been many illustrious sons of illustrious sires in English history, but they have rarely been the eldest. Queen Elizabeth was served by two great Cecils, and George III by two great Pitts; but the first Earl of Salisbury was not the eldest son of the great Lord Burghley, nor was William Pitt of the Earl of Chatham. Three of the five Tudors were among the greatest of English sovereigns, but not one of the three was the eldest son or eldest daughter of a king. A house selected from the sons of peers would have been an abler body than the house of eldest sons, and more hereditary virtue has enriched the house of commons than the house of lords. Primogeniture was given its peculiar and exclusive privilege in order to keep fiefs intact, and not from any belief in its efficacy in the transmission of wisdom. The special writ of summons became attached to great hereditary baronies because the consent of their holders was essential to the financial success of the king's proposals in parliament; and the principle of primogeniture was communicated from the barony to the special writ of summons.

The growth of this principle led to the depression of the simple councillors in parliament, and as early as Edward III's reign the judges were denied a vote, though not a voice, in the high court of parliament in which they sat. They become assessors or advisers; and while Sir Thomas More, as chancellor, presided over the lords' deliberations, participated in their discussions, and adjourned their sessions from day to day, he had no vote in their determinations. It was not, however, until comparatively modern times that the hereditary element became predominant in the house

of lords. Down to the dissolution of the monasteries the non-hereditary spiritual peers constituted a majority; and until a considerably later period the bishops and newly-created peers outnumbered those who owed their writs of summons to heredity. There were sixty temporal peers when James I ascended the English throne; but he created fifty-four, and the bishops numbered twenty-six; and the eldest sons of peers had barely attained a majority in the house of lords when the Long Parliament abolished it as a dangerous and unnecessary institution. The house of lords, as it is known to-day, is the outcome of the Restoration.

CHAPTER VI

THE GROWTH OF THE HOUSE OF COMMONS

ALTHOUGH the "commons" were the last of the elements to arrive in the thirteenth-century parliament, they have suffered less subsequent change of position than the crown, the judges, or the lords. The presence of the crown has, except in theory, been limited to ceremonial occasions; most of the judges of the high court have been excluded altogether; and the lords of the council in parliament have been converted into an hereditary peerage. The "commons," however, have remained in many essentials what they were in the reign of Edward III, when they shared with the crown the privilege of being one of the two indispensable elements in a valid parliament.[1] Then, as now, the essence of parliament was parley between crown and commons, the government and the governed. There were other factors than the crown in the government, and other "estates" than the commons among the governed; but they were minor ingredients. The distinguishing feature of the English parliament is the junction it made between government and the people. Not that the house of commons was ever that house of the common people which it is sometimes supposed to have been. For "commons" means "communes"; and while "communes" have commonly been popular organizations, the term might in the thirteenth and fourteenth centuries be applied to any association or confederacy.

Common action was, however, commoner among the common people, because they had greater need than individualistic barons of union for self-protection, and it was

[1] *Modus Tenendi Parliamentum* in Stubbs's *Select Charters*, p. 512.

only under the pressure of exceptional royal tyranny that barons borrowed the methods of association from the humbler townsfolk who first put the fear of "communism" into the hearts of privileged classes. A "commune," wrote a horrified monk of St. Swithun's when John, in the absence of Richard I, granted common self-government to London, *est tumor plebis, timor regni, tepor sacerdotii*,[1] which might be flippantly rendered in the vernacular, "a commune swells the people's head, terrifies royalty, and puts the clergy in a stew." It was a popular conspiracy, and the chronicler doubtless had in mind those formidable communes of northern Italy which had humbled the pride of an emperor at Legnano. Monarchy in England was made of stouter stuff than the Holy Roman Empire; but, if Richard of Devizes could have foreseen that "commune of communes," as the house of commons was called two centuries later, his prophetic soul might also have foreboded 1649 and 1688, when the commons became indeed a terror to royalty, and perhaps other occasions, both later and earlier, when they "put the clergy in a stew."

But the "communes" or "communitates," which gave their name to the house of commons, were lawful and orderly, comprehensive, but not democratic associations. They were simply the shires or counties of England, and the full county courts in which the knights of the shires were chosen did not include the "common" people. For villeins were not legally qualified to perform the judicial functions for which the courts were held. They did not attend as "suitors of the court," and they were only represented in the sense in which the lord of the manor was held to represent his tenants without any choice or election on their part. Even the freeholders who possessed less than a 40s. freehold were excused in the reign of Edward I;[2] and excuse from attendance to unpaid and unpopular duties meant absence. The

[1] Richard of Devizes, p. 53.
[2] *Rot. Parl.*, i. 116; the statute only applied to the county courts, and not to the assizes held by the king's justices in cities, boroughs, and other market towns. The exemption of 1294 became the exclusion of 1430.

duty was even attached to particular tenements rather than to their holders, and instances are known in which suit at the county court was imposed as a condition of the lease or grant of land.[1]

This suit at the county court was, of course, required for the administration of justice, and it is important to remember that not only the members of parliament, but the electors as well, were primarily jurors, and only incidentally electors. Justice was the regular monthly work of the county court, the election of members of parliament was an occasional addition to the duties of those who were already present to exercise jurisdiction. The house of commons, as well as the house of lords, grew out of the legal system, and the politics of parliament were the outcome of its law. It was in this legal atmosphere that representation had its birth, and the county court is the foundation of the house of commons. Representation was not the offspring of democratic theory, but an incident of the feudal system.[2] Suit and service were due from all; but, we are told in the *Leges Henrici Primi*, if the lord or his steward will go to the county court, his presence will "acquit" the tenants on his domain.[3] If neither lord nor steward is present, there must come the priest and the reeve, and four best men of the township on behalf of their fellows. The boon of representation is not in election to serve, but in the licence to stay away; it consists in the immunity obtained through the vicarious service of others, and centuries elapse before the service becomes a privilege and the burden an object of envy and a source of pride. In the twelfth and thirteenth centuries the difficulty is to enforce the attendance of representatives; medieval "liberties" were nearly fatal to representation and to the county courts, for the most cherished liberty was that which excused the lord and his tenants from the hundred and county courts, and gave them jurisdiction of their own.

But, scanty and reluctant though the attendance may

[1] Maitland, *Collected Papers*, i. 458.
[2] See below, p. 153.
[3] Stubbs, *Select Charters*, ed. 1900, p. 105.

have been, the court was the legal embodiment of the shire; everything it did was the deed of the shire, and except through it the shire did nothing. Its verdicts were the final verdicts of the shire;[1] there were no imperative mandates from below, no limitation of powers, and no referendum; its representative character was complete. It was the *communitas*, and not a mere "estate." Bishops, earls, and barons, as well as knights, were expected to attend in person or provide their representatives,[2] and all were "peers of the county."[3] "Peers of the realm" did, indeed, secure exemption after a while—not as a class, but as individual recipients of royal grants and charters—and the ground of their exemption was perhaps their liability to a special summons to more arduous business at Westminster. But the exemption was not a prohibition; they could attend if they liked, and it is probable that the magnates who in later centuries intervened in the nomination of members of parliament in the shire courts, were not exceeding their legal rights. It was only a resolution of the house of commons that forbade a peer to concern himself with parliamentary elections.

Here in the shire courts was acquired that habit of common action, and here was laid that foundation of public opinion, upon which the house of commons was based. It may be that undue stress has been laid upon the fact that, while Simon de Montfort summoned the citizens and burgesses to his parliament by writs addressed direct to the cities and boroughs, Edward I sent the writs through the sheriffs and had the returns made in the shire courts. It was, indeed, more than a question of mere machinery, for the common return of knights of the shire and burgesses in the same shire courts emphasized a community which was retained in the house of commons. But the links were forged at an earlier period, and were made of stouter stuff than sheriffs'

[1] Maitland, *Lectures on Constitutional History*, p. 43.
[2] *Leges Henrici Primi*, Stubbs, *Select Charters*, p. 105.
[3] This phrase occurs frequently in the fourteenth century, and probably means the "judges" of the county court as defined in the *Leges Henrici Primi*, c. xxix., Stubbs, *Select Charters*, p. 106.

writs. The knights who failed to obtain baronial exemption from attendance at the shire courts recouped themselves by managing the business of their humbler neighbours in the shires. It was they who prepared the agenda for the fiscal and judicial visits of the justices in eyre, consulted with the townsfolk and small freeholders in attendance at the court, and negotiated their affairs. They had their reward in a leadership, lost by the peers of the realm through their privileged abstention from the county courts, and won by the knights who continued at Westminster the popular co-operation they had learnt in the shires.

Nor is there any reason to suppose that this presentation and conduct of popular business by the knights was limited to the county courts in the thirteenth century before the formal election of members to parliaments or great councils. Henry II had thrown open the doors of the *curia regis* to suitors of all sorts—save villeins pleading against their lords; and nothing in the records of Edward I's parliaments suggests that the regular invitation to suitors, with which a parliament always began, was a novelty. Suitors had been in the habit of coming to Westminster from the county courts before the days of Simon de Montfort and Edward I; and it is almost certain that knights from the shire did a good deal of representative legal business at Westminster before they were summoned thither by writs. The writ to the sheriff, the election in the shire court, and the indenture between the sheriff and the elected knights merely made formal and regular the spontaneous habit of representation of counties by knights at the king's high court; and the intervention of chancery, with its formal writs and returns, was, no doubt, intended to render the words and deeds of the representatives more binding upon their constituents. They were to come, not merely with such varying powers as different counties might at different times choose to give them, but with full power to commit all the counties alike to approval of whatever proposals the king and his council might lay before them; and in Edward I's parliamentary writs there was implied, not only a theory of government by consent,

but also the authority of representatives and the tyranny of majorities.

Similarly there are grounds for believing that cities and boroughs had been represented at Westminster before Simon de Montfort issued his writs,[1] and that the petitions from towns which abound in the earliest "Rolls of Parliaments" had not sprung up in a generation; and again, all that Simon did was to systematize, and perhaps turn to political and party purposes, a habit of representation that had long obtained in the redress of grievances and the administration of justice. The itinerant justices did not exhaust the judicial business of the counties or the judicial powers of the king's court. There was always the reserve at Westminster; to tap justice at its source the counties had to appear by their representatives in the *curia regis*, and the original purpose of parliament, as declared on countless occasions throughout the fourteenth century, was by means of a joint session of the courts to redress delays and determine cases in which the judges were in doubt.

Out of this attendance of representatives of the shires at the *curia regis* grew in time the share of the house of commons in the judicial work of the high court of parliament. They were not, it is true, judges in parliament, but they were the grand jury of the nation; the lords could try no commoner except on their impeachment, and their presence was essential at various stages in the proceedings. The separate representation of cities and boroughs was, no doubt, due to the varying degrees of immunity from the jurisdiction of the shire courts which they enjoyed. But no city save London seems to have secured total exemption from the shire system before the fourteenth century, and there must therefore have been a local basis of co-operation between town and county, which facilitated co-operation between their representatives in parliament. The co-operation was not, however, complete at first; as late as the reign of Edward III knights and burgesses act independently, and seemed not unlikely to form

[1] *Rotuli Chartarum*, Record Comm., pp. 57, 65; Pike, p. 337.

separate "estates."[1] Their ultimate amalgamation was due to the exigencies of parliamentary organization.

The house of commons was not, in fact, created either by Simon de Montfort or by Edward I. Representatives of shires, cities, and boroughs attended the king's court at Westminster for judicial and financial purposes before either Simon or Edward issued their famous writs. They came, indeed, sporadically and not as a body of men; but their organization into a "house" of commons required a great deal more than the simultaneous summons to shires and boroughs issued by Simon and Edward. It grew up during the fourteenth century, and its growth is slow and obscure. The "Rolls of Parliaments" tell us little about the house of commons, because they are only concerned with what is done in parliament, and technically the discussions and other domestic business of the house of commons are not transacted *in* parliament at all. Down to this day the commons' debates are beyond the ken of the clerk of the parliaments, an official who sits in what has come to be called the house of lords. In the fourteenth century they were held in the refectory or the chapter house of the abbey of Westminster; and as late as the reign of Henry VII the commons only "appear" in parliament when they come to hear the opening speech, to present their Speaker,[2] or to announce by his mouth the decisions they have reached on the business submitted for their approval. Consequently it is on these occasions alone that they figure in the "Rolls of Parliaments" kept by the clerk of the parliaments, who sits in the parliament chamber of the palace. It is true that early in Edward III's reign an "under clerk of the parliaments" has been told off to attend to the domestic business of the commons, and ultimately he becomes the clerk of the house of commons. But his duties were apparently to draft the

[1] As late as 1523 they took separate action (Hall, *Chron.*, p. 657).

[2] The obscurity which covers the origin of the Speakership and early development of the privileges of the commons is due to the total absence of any record of the domestic proceedings of the house of commons in the chapter house until its *Journals* begin in 1547. The entries in the "Rolls" only relate to decisions after they have been reached by the house and are reported in parliament by the Speaker (see *History*, iii. 33–5).

common petitions of the house, and possibly to keep some record of attendance, upon which the exchequer founded its writs *de expensis*, entitling members to recover their wages from their constituents. No other trace of his activity has been found; it is improbable that any *Journal* of the house of commons was kept before 1547.[1] If it was, it has been lost, and in any case its contents were not incorporated in the "Rolls," which ignore proceedings taken outside the parliament chamber.

Another cause of obscurity in the history of the house of commons arises from the indeterminate character of the terminology employed in the "Rolls." By the end of the fourteenth century the term *communitates* or *communes* implies both the knights of the shires and the representatives of the cities and boroughs; but this usage expresses the result of a gradual amalgamation, and before 1350 the word is used in different senses. *Le commun* is used in 1258 of a clique of barons; in 1259 *communitas bacheleriæ* describes a "cave" of aristocratic forwards. In 1340 *les communes de la terre* is the phrase employed to distinguish the knights of the shires from the representatives of the cities and boroughs. In 1343 we have *les chivalers des countez et communes*, where *communes* seems to mean the town members as distinct from the knights of the shire; but in the next line we have *prelatz, grantz, et communes*, where both are apparently included in the common designation, and later on the same page we have, *les chivalers des countees et les autres communes*. Similarly in 1332 we have a distinction between *les chivalers des countez* and *les gentz du commun*.[2]

Beneath this confusion of terminology it is not possible to detect any real house of commons consisting of a combination of knights and burgesses. It should be remembered that many knights of the shires were not *chivalers*, and

[1] See *Trans. Royal Hist. Soc.*, 3rd Ser., viii. 27.

[2] *Rot. Parl.*, ii. 65*a*, 112, 136; cf. Tout, *Edward II*, p. 89. In 1352 we have reference to "longe trete et deliberation eues par les communes ove [avec] la communaltie, et l'avis d'aucuns grantz a eux envoiez" (*Rot. Parl.*, ii. 237*b*).

that many barons summoned by special writ were. There was no social designation to distinguish the lesser from the greater baron; either might be a *chivaler*, either was a baron, and either was *nobilis*—a quality attributed to knights as late as the fifteenth and sixteenth centuries. Out of a list of twenty-four knights present at the parliament of 1305, ten had received a special baronial summons. The sole distinction between knights and barons was drawn by royal writ of summons, and it is significant that when, at the parliament of Lincoln in 1301, we find the earliest notable instance of the parliamentary activity of a knight of the shire, that action is taken by Henry of Keighley, as the mouthpiece of the barons, and not as a leader of the commons. It is probable that for a generation after 1295 the influence of the "communes" in parliament was simply that of the lesser tenants in chivalry. What general legislation there is affects them only, and they act as a knightly estate rather than as a house of commons.

Nor must their parliamentary importance be exaggerated. There is hardly a parliament of the first half of the fourteenth century the opening of which had not to be postponed owing to defective attendance. But the defect is always due to the absence of prelates and magnates, and never to that of knights or burgesses; and it is more probable that such absence was not regarded as a fatal defect in a parliament than that it never occurred. The summons of knights of the shire and burgesses does not prove their attendance; and when, later on, measures are taken to compel attendance at parliament, they are applied to magnates long before they are enforced upon knights of the shire or burgesses. The summons was all that was needed; according to the *Modus* a total absence of magnates did not invalidate a parliament, provided they had been summoned; and even Magna Carta had laid it down that the absence of those who abstained was not to frustrate the counsel of those who attended. Absence, following upon due and lawful summons, gave consent as effectively as silence on the part of those who were present. In the parliament of September 1332 a tenth

was imposed on cities and boroughs, although the only consent recorded is that of the prelates, earls, barons, other magnates and knights of the shire who granted a fifteenth;[1] and, although the election of burgesses to that parliament is recorded in the *Official Return*, no trace of their presence is found in the "Rolls." That some burgesses as well as some knights of the shire did attend this and other parliaments, their presence in which is not mentioned in the "Rolls," is probable. But it seems clear from the writs *de expensis* that election did not mean attendance, and that the large number of elections recorded in the *Official Return of Members of Parliament* may convey an exaggerated impression of the importance of the commons in parliament.[2]

The treatment of the commons by the crown during the first years of Edward III's reign was not, in fact, calculated to encourage attendance. In March 1332, for instance, the commons met on Monday the 17th; five days later they were told that their petitions had neither been received nor answered, and that they might go home, the king promising to call another parliament to deal with such business. This he did in September; but as soon as money had been granted, the other estates, though not the burgesses, were asked to advise the king whether he should deal with petitions or go north to deal with the Scots. He was advised to deal with the Scots, and the commons had to be content with a gracious promise to deal with their petitions at a convenient season. The third parliament for that year met at York on December 4, but only five prelates attended; the requisite lords and lawyers failed to appear, petitions could not be answered, and parliament was prorogued until January, when again it met at York.[3] A journey to Westminster was then a matter of weeks; a journey to York was worse for most of the members. Cornwall returned ten members to the parliament of March, and fourteen to that of September; but it is not surprising that only two of the ten were found among the fourteen, or

[1] *Rot. Parl.*, ii. 66.
[2] Cf. Tout, *Edward II*, 1914, pp. 89–90, 104. See below, Chapter xvi.
[3] *Rot. Parl.*, ii. 64 ff.

that no returns at all have been discovered from Cornwall to the parliaments of December and January.[1] It needed the Hundred Years' war, with its financial embarrassments, to render the crown more respectful and the commons readier to make better use of the parliamentary organization which had been slowly developing since the days of Edward I.

No precise dates can be assigned to the steps in that progress, and it has been further obscured by antedating the definiteness of parliamentary institutions. All talk about two houses of parliament in the fourteenth century is clearly beside the mark, and it can hardly be too often repeated that the earliest reference to a "house of lords" occurs in the reign of Henry VIII. Edward I was as ignorant of two houses of parliament as he was of three estates, and his Model Parliament consisted of a single chamber. Nor can we obtain an accurate view of Edward's parliaments so long as we regard them as being primarily legislative assemblies. The king summoned them to secure supplies, and members attended to seek redress for their grievances. But the petitions they presented would practically all be now called private bills; they were not collective petitions and were not preferred by corporate action. Of the five hundred petitions presented at the parliament of 1305, five only deal with matters of public concern, and of these five three affect feudal tenants-in-chief alone. Ninety-nine hundredths of the petitions are individual requests for legal relief, for royal favour, or for redress of private wrongs, and they called for no common action among the petitioners.[2]

An appreciation of the significance of this fact is essential to any understanding of the Edwardine parliament. There could be no house of commons so long as this condition continued, for such an institution could only grow out of common action. Again, this fact alone would indicate that

[1] *Official Return of Members of Parliament*, s. aa.

[2] This computation was made from the petitions for 1305 in Maitland's *Memoranda de Parliamento*. Palgrave in giving evidence before the Committee on Public Petitions in 1832 reached a similar conclusion from his knowledge of the whole medieval period: "I should state that ninety-nine out of every hundred petitions presented by individuals related to individual grievances" (*Parl. Papers*, 1833, xii. 20).

the function of parliaments was primarily judicial; for individual wrongs are always the proper subject of judicial action, and even to-day, when parliament deals with private bills, we commonly speak of it as acting in a judicial or semi-judicial capacity; the committee to which they stand referred hears counsel on both sides, and compels parties to prove their *locus standi*, as in a court of law, before they will be heard.[1] On the other hand, common petitions, or, as we now call them, public bills, are matters for political and legislative action. So long as parliament had mainly to deal with individual petitions, it remained predominantly a court of law: as soon as common petitions supersede individual petitions, parliament becomes a legislative body. No rigid line can be drawn—notwithstanding the constitution of the United States—between judicial and legislative action, and judges make law to-day in the United States as well as in Great Britain, the difference being that in England it is historically their proper function, and legislation grew out of adjudication. It follows that no definite line can be drawn between individual and common petitions, and no date assigned to the supersession of the former by the latter as the main business of parliaments.

But it is obvious that this transition is an important, perhaps the most important, factor in the development and organization of parliaments. The growth of the common petition was the natural result of the collection of knights and burgesses in a common gathering at Westminster and of the collective answer the crown required to its requests for money. Members from divers constituencies could hardly fail to fall into a habit of comparing notes, possibly at first in informal conversation and afterwards in more regular ways, with respect to the petitions with which they were charged; and sooner or later they would be impressed by the extent to which these individual petitions had a common foundation in the normal behaviour or misbehaviour of the ministers of the

[1] See Erskine May, *Parl. Practice*, Bk. iii. The procedure of the houses on private bills is totally unintelligible except on the ground that parliament is a court of law.

king, judges, sheriffs, eschaetors and so forth. Before long it must have occurred to the shrewder among these early parliamentarians that it would be wise to pool their petitions and their powers of pressure upon the crown. It was an elementary form of union, for which the crown itself had paved the way by demanding common grants of aids and subsidies from the commons at Westminster instead of demanding them from individual "communitates" throughout the country; and almost certainly it was one of those constitutional developments of the reign of Edward II, the importance of which has been neglected in the attention devoted to the more sensational episodes of the struggle between the king and his barons.[1]

At any rate, from the parliament of November 1325 onwards the "Rolls" begin to draw a distinction between petitions presented *pur tote la commune* and *aliæ petitiones in parliamento;* and, but for the difficulty of determining the exact meaning of the word *communitas*, it might be possible to date the beginning of "common" petitions some years earlier.[2] There had, of course, long been common petitions of the barons, tenants-in-chief, and occasionally of the clergy; but the closing years of Edward II's reign and the opening years of Edward III's seem to be marked by the earliest common petitions of the knights and burgesses who came to constitute the house of commons. In the parliament of February 1326–7 we have such phrases as *peticions par les chivalers et la commune, prie la commune,* and *prient les chivalers et la commune.* One of the common petitions of 1325 is interesting from two other points of view: the form of address—*et auxint, sire, prient vos liges gentz*—seems to imply a personal allocution by a Speaker, and the content of the petition is a complaint that

[1] Prof. Tout has dealt with the administrative side of this development in his *Place of Edward II's Reign in English History;* its parliamentary aspect still needs elucidation.

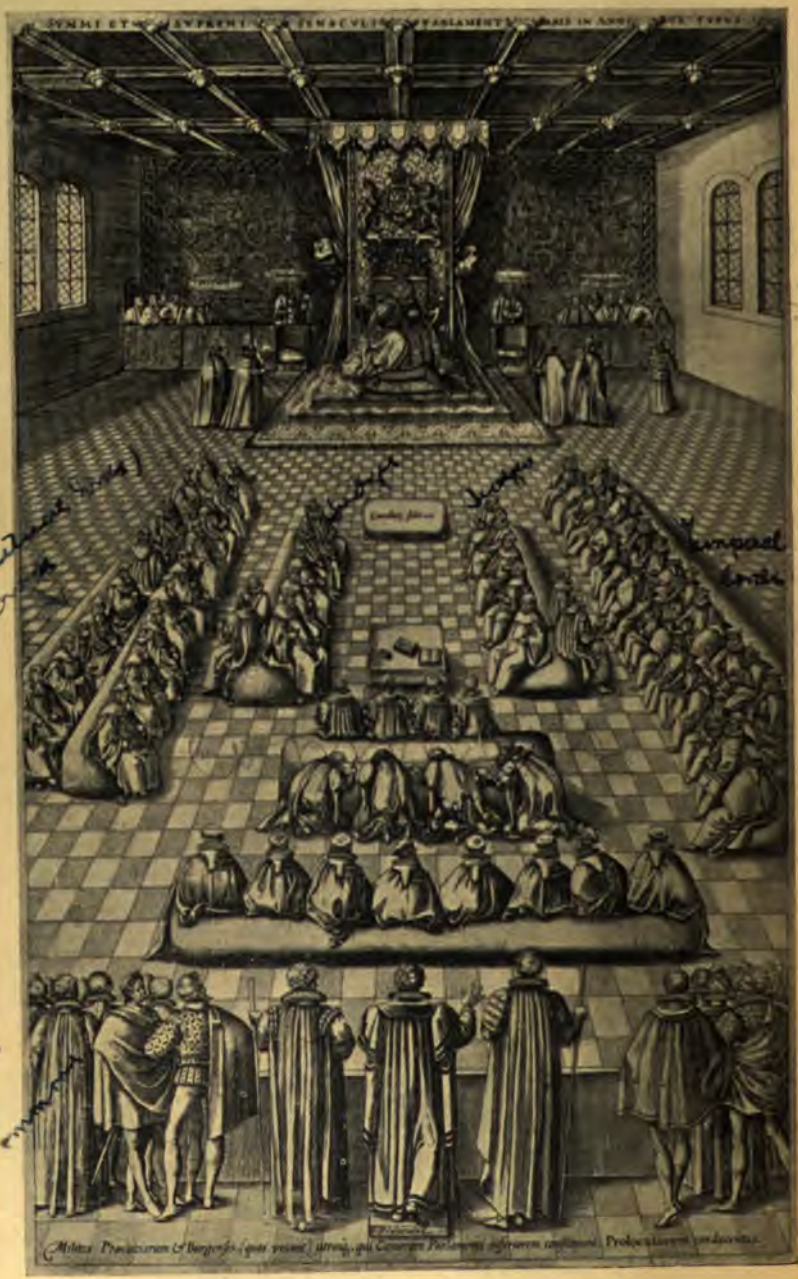
[2] There are, for instance, from 1314 onwards, various parliamentary proceedings "ad petitionem communitatis Angliæ," e. g. *Rot. Parl.*, i. 319*a*, 324*b*, 375*b*; and on February 17, 1316, "Magnates et communitas Angliæ concesserunt regi in auxilium . . ." (*ibid.*, i. 351). In 1320 there is a petition from the "milites, cives, et burgenses" (p. 371).

when they present their petitions *les unes sount ajournes devant le roi, et les autres devant le chancellier, dount nul issue n'est fait.*[1] Reference to the king's bench—*coram rege*, to chancery, and to other courts, was, we have seen, the regular method of dealing with petitions in parliament; it has now become a grievance for which a remedy is sought by the commons and promised by the crown. The remedy is not prescribed in 1325, but it appears in 1327 in the demand of the commons that their petitions may be made statutes in parliament and held good.[2] This demand would only apply, as a rule, to common petitions: the individual petitions would continue to be referred to the various courts; but the common petitions come to be taken first, to be answered in parliament before the "estates" go home, and to be enrolled as statutes.

The common petition is thus the root of the house of commons as a separate legislative assembly. Institutions in the middle ages are not made, they grow; the common petition required common deliberation, common action, and perhaps even a common clerk; the common action became a habit, the habit an institution, and the institution a house. Such processes, especially in their initial stages, are not recorded; but in historical as well as in physical science we have to deal with many developments of which we possess no records, and the fact that they were not recorded does not prove that they never occurred. There is ample evidence that no house of commons existed in Edward I's reign, and ampler evidence that it did exist in that of Edward III; and it is our business to infer from such knowledge as we possess the means by which it developed. This requires a little imagination, but without any undue stretch of fancy, one or two guesses may be hazarded with regard to the growth of parliamentary procedure early in the fourteenth century.

The king in council clearly met the lords and commons in parliament in common session, when the chancellor or some other member of the council, usually a judge, explained to the assembly the purport of its summons and the requests

[1] *Rot. Parl.*, i. 430. [2] *Ibid.*, ii. 10, 12.



PARLIAMENT IN 1585.

for assistance and advice that would be laid before it. The advice was mainly a matter for the lords, the assistance for the commons. There is reason to believe that from Edward I's time the king's council sat in the midst of this assembly on four woolsacks (of which only one remains) facing one another, and that Fleta's phrase about the king holding his council in his parliaments has a literal and material, as well as a figurative meaning: no one would have arranged the four woolsacks in that way unless their occupants were normally engaged in confidential deliberation. Outside this inner ring there sat, to the right of the throne, the spiritual lords, and to the left the temporal lords, and facing the throne there stood the commons. To them the demand for aid would be particularly addressed, and then the problem of how and what to answer would arise. Probably there would be a division of opinion, and possibly discordant murmurs; courageous commons at the back might urge in whispers to their colleagues in the front the exorbitance of the king's demands and the necessity of refusal; timid members at the fore might tell their daring but half-concealed advisers at their back to speak for themselves; and then, amid the muttering and murmuring, the chancellor or other member of the council might suggest that not much progress was being made, and that the commons should go and talk it over among themselves, and then come back with an intelligible answer. On some such occasion it must have been suggested that they should choose some one of their members to be their Speaker, and that his answer, whether representing unanimity or but a small majority, should be considered equally binding upon all. The commons then trooped out of parliament to discuss in some more private place their domestic differences. They only reappeared in parliament when they had reached a resolution which was reported by the Speaker; and he alone had liberty of speech in parliament.

This procedure was probably not limited to the commons: each estate deliberated apart and outside parliament, and at first the knights of the shire and the burgesses occasionally, if not regularly, deliberated apart from one another. There are instances of the lords deliberating apart from the council

in parliament, though in the end the lords remained with the council in parliament to form the house of lords. The clergy went off to convocation, and it soon becomes impossible to distinguish between assemblies of the clergy summoned by the archbishop for ecclesiastical purposes and assemblies of the clergy summoned by the king for temporal objects. Logically, of course, there was a fundamental distinction between the two: the clergy summoned by the archbishop consisted only of the clergy in his province; the clergy summoned by the king consisted, or should have consisted, of clergy from both provinces alike. But in this respect the church proved stronger than the crown, and the provincial organization of the one prevailed against the national organization of the other. Instead of uniting to form a clerical estate in parliament, the clergy of the two provinces preferred to transact their temporal business, such as voting taxes, in their two provincial convocations, and to abandon parliament except in so far as they were represented there by prelates who held baronies of the crown and failed to escape the liability involved therein.

Where the commons conducted their domestic deliberations when they first departed from parliament, is not known; but in Edward II's reign they seem to have met in the refectory of Westminster Abbey, a place outside the jurisdiction of the chamberlain and other palace and parliamentary officials. Soon they took to meeting in the chapter house, which enjoyed similar immunity; their presence there is recorded in 1352, and by 1376 the chapter house is already described as their ancient place of meeting.[1] This departure is the first step in the so-called separation of parliament into two houses; but that separation has never been complete, and the house of commons was formed, not so much by separation from the house of lords, as by the amalgamation of knights and burgesses. There are still many forms which indicate the unity of parliaments, and those forms were realities long after the fourteenth century. The discussions in the chapter house were not, strictly speaking, transactions in parliament at all, and the gather-

[1] *Rot. Parl.*, ii. 237, 322; cf. "*History*," iii. 34.

ings of commons, clergy, lords, were more like committees than houses of parliament. Then, as now, no act of parliament could be made or done outside the parliament chamber; then, as now, the presence of the Speaker and commons was required at the passing of every bill,[1] at the opening and prorogation of every parliament. Parliament still acts as one body, and not as two houses, in all its solemn functions, but in the fourteenth century the "houses" had neither been organized nor reduced to two. The "committees" were the various estates in parliament, who as late as 1381 are referred to as "prelates, temporal lords, judges, knights, and all the other estates." It is the "knights and all the other estates"[2] who migrate to the chapter house and become in time the house of commons.

The judges remained, naturally, in the parliament chamber with the council, of which they were an integral part. For some time and to some extent the spiritual and temporal peers deliberated apart from the council in parliament and from one another.[3] But baronial tradition and influence proved too strong for the king in parliament; and while outside parliament the council became "privy" and remained royal, inside parliament it became "magnum," and from about the middle of the fourteenth century, whenever we read of the king's council in parliament the king's great council is meant.[4] In time the peers monopolize the position of "consiliarii" in parliament, reduce the other councillors, such as the judges and even the chancellor, to the status of

[1] It was a demand of the commons in 1348 that their petitions should be answered and endorsed "en parlement devant la commune" (*Rot. Parl.*, ii. 165).

[2] Probably the clergy were not included in this vague reference, having already before 1381 practically severed their connexion with Parliament.

[3] See, for instances of separate deliberation of spiritual and temporal lords, *Rot. Parl.*, ii. 64*b*, 66.

[4] This is one of the points Prof. Baldwin has not elucidated, and it remains obscure. As late as 1433 there was a "king's great council in parliament" as well as a "king's great council out of parliament" (Nicolas, *Proc. of Privy Council*, iv. 185–6); the latter contained nominated knights of the shire (*ibid.*, i. 156, vi. 339). Probably a "council" was not even yet regarded as a definite body of men, but rather as a conference without any specification of personnel. The personnel would be specified by the writs of summons and not by the name of the meeting to which they were summoned. It is doubtful whether we should think of definite "bodies" until we can properly talk of "corporations."

voteless advisers, and eliminate all trace of separate consultation of peers apart from councillors. The lords, therefore, instead of leaving the parliament chamber to deliberate by themselves as one or two estates, remained with the council as advisers of the crown. It is thus that the petitions of the commons are enacted with the advice and consent of the lords; for the lords are the lords of the council which they have invaded. They sit in the parliament chamber, they transact all their business there, and they are not called a "house" until the sixteenth century.

The knights of the shire and the burgesses were thus left to retire alone for joint or separate discussion and resolution. Their co-operation has been commonly regarded as the outcome of a deliberate determination of the knights to throw in their lot with the burgesses rather than with the lords; but this view presupposes too great an influence of the burgesses in parliament. There is hardly a definite trace of parliamentary action on their part before 1340, while there are many occasions on which the knights were consulted without any reference to burgesses at all.[1] It would appear that the knights had already established the habit of independent deliberation, and that the fusion of the county and civic representatives was rather due to the burgesses attaching themselves to the knights. No doubt there must have been a reciprocal willingness on the side of the knights, and it is a peculiar and remarkable feature of the English constitution that the knights, in spite of their social and political bonds with the barons—such as common military tenure-in-chief and common ideas of chivalry—should have found it easier to work with burgesses than with barons; indeed, it would not have been possible but for the shrinking of the baronage into the peerage.[2] The fusion of knights and burgesses was,

[1] E. g. *Rot. Parl.*, ii. 66.

[2] This, in its turn, was largely due to the success of the crown in insisting on the writ of summons as the qualification for attendance at parliament. If parliament had really been a system of estates, and the second estate had elected its representatives, the lesser barons would doubtless have continued to co-operate with the greater. But these greater barons were summoned by special writ, which gave no opportunity for election and removed them from the control of the lesser.

however, a slow process, the steps in which might be traced in some detail in the "Rolls of Parliaments"; possibly the Good parliament of 1376 exemplified the firstfruits of amalgamation. In any case, separate consultation of knights and burgesses grew rarer, while their joint deliberation in the "domus communis" grew more regular and well defined.

This growth required some organization, and during the fourteenth century the development of the house of commons gave rise to the speakership and clerkship of the house. The *Modus Tenendi Parliamentum* speaks of each of the five "gradus" of parliament having its own clerk;[1] but the fusion of estates reduced the number of clerks to two, or three if the clerk of convocation be included. The clerk of the parliaments was, as he remains to-day, the official responsible for the records of the transactions of the estates in common session in the parliament chamber, now called the house of lords; his assistant, the second clerk, was told off to do the clerical work of the knights and burgesses, and became the clerk of the house of commons.[2] He kept no journal in the modern sense of the word, though he may have kept in the fifteenth, and certainly kept in the sixteenth century a book in which he entered the attendance of members.[3] But his principal work was to draft the answers of the commons to the king's demands, and to reduce to writing common petitions or bills based upon the discussions in the house. The individual petitions which members brought up with them were, no doubt, drafted locally, but to combine them in common petitions or to draft fresh ones after deliberation required a clerk of the house.

[1] There is no direct trace of the action of these five clerks in the "Rolls"; possibly the *Modus* refers to the period before the "Rolls" become anything like a full record of parliamentary proceedings.

[2] The so-called clerk of the house of commons is still described in his patent of appointment "Under-Clerk of the Parliaments appointed to attend the House of Commons." (*Report on Establishment of H. of C.*, Parl. Papers, 1833, xii. 15).

[3] In the fourteenth century the attendance of knights and burgesses was so little necessary that no means of compulsion were employed, the only penalty being loss of wages. Richard II tried to compel the attendance of barons, but compulsion was not regularly applied to burgesses until the sixteenth century; see below, chap. xvi.

The other official was the Speaker, so called because he "spoke for"[1] the commons in parliament and alone enjoyed liberty of speech in the parliament chamber. This, of course, was an entirely different liberty from that with which it has been confused, the liberty of individual speech on the part of members in the "domus communis," which was not in parliament at all. The medieval claim made by every Speaker at the beginning of every parliament was for himself alone, and referred to transactions in the common sessions in the parliament chamber. There each prelate, baron, or councillor might speak, but no member of the commons save the Speaker, and this is the rule to-day. He could only speak as the mouthpiece of the commons, and the principal, indeed, the only, liberty he claimed for a century, was that, if he misreported or misrepresented any resolution of the commons, he might withdraw or correct what he had said. The entirely different claim to freedom of speech on behalf of individual members in the house of commons was not added to the Speaker's repertoire until the reign of that great architect of parliament, Henry VIII.[2] With regard to those other functions of the Speaker which have eclipsed his original reason for existence, their growth is wrapped in darkness. No records whatever have survived of the domestic proceedings of the house of commons earlier than 1547, and we have no information about the steps by which the Speaker became chairman of the house and by which his authority was developed. Sir William Trussell was apparently Speaker in 1343,[3] but he and his medieval successors only appear on the record when they have left the *domus communis*, and come at the head of their fellow-members before the lords and the council in the parliament chamber.

[1] "Prolocutor" is his earliest official title.

[2] In 1477, for instance, the Speaker asks for "omnes ac singulas alias libertates et franchesias quas aliquis hujusmodi Prolocutor perantea melius et liberius habuit." The petition is for himself, and not for other members of the House (*Rot. Parl.*, vi. 167). In 1482 the Speaker, John Wood, omitted the petition for these "alias libertates" (*ibid.*, vi. 192; cf. iv. 420, 482).

[3] *Ibid.*, ii. 136 *b*: "et puis vindrent des chivalers des counteez et les communes et responderent par Monsiour William Trussell."

But the mere existence of the Speaker is evidence of a corporate feeling and organization, which was totally lacking in the reign of Edward I but grew out of a subsequent half-century of common deliberation and action. Then knights and burgesses had only been present at Westminster as individual petitioners on behalf of their constituents; and it is even doubtful whether they voted grants collectively or by separate bargain with the crown. In the reign of his grandson they are a coherent body of national legislators. The "common" petition has been developed, backed by the hint of a common resistance to taxation; and in 1340 half a dozen citizens and burgesses, as well as a dozen knights, are elected by their fellow-members to join with certain prelates, earls, and barons to try and examine the petitions presented in parliament and put them into statutes which shall be perpetual.[1] This is the method by which the commons asserted legislative power. They never claimed a right to initiate legislation; and much industry has been wasted in attempts to fix the date at which the commons asserted their right to legislate. They do not possess that abstract right to-day. The crown alone enacts legislation in parliament; the commons merely petition, and the right of petition has existed since the days of Henry II. The process of development was more subtle than any declaration of right. The individual petition was gradually turned into the common petition of the house, and then backed by the control of the purse, and the so-called right to legislate consists in the commons' power of making government impossible if heed is not paid to the petitions they have the right to present.

The change from the individual to the common petition was fundamental. The high court of parliament was converted into a legislature, and its judicial function obscured by its legislative activity. Common petitions lead us out of the realm of common law into that of common politics; for the individual wrong is a matter of law, the common grievance is a question of politics. Common petitions could

[1] *Rot. Parl.*, ii. 112.

not be settled in court, and the remedy for their reference to chancery, king's bench, and so forth, of which the commons complained in 1325,[1] could only be found by their enactment as statutes in parliament *devant la commune*. Common action is the cause, as well as the result of community of feeling, and the *communitates* become the *communitas communitatum*. By that process the locally-minded representatives of heterogeneous communities are welded into a house of commons, and in that house, more than anywhere else, the "estates" are made into the state.

This growth of common petitions, and the absorption of the commons in their prosecution, diminished the share of the commons in the judicial work of parliament, made parliament itself less of a high court, and fostered the ultimate but incomplete differentiation between our high court of parliament and our high court of justice. Individual petitions were more and more neglected by the commons; they insisted upon answers being given to their common petitions in parliament before they dispersed, but they would not wait for answers to individual petitions. These were more and more referred to the council at the end of the session,[2] if they had not already been answered, and this reference entitled the council to endorse its answers *per auctoritatem parliamenti*.[3] Answers to such referred petitions were also entered on the "Rolls of Parliaments," although not given until after the dismissal of the estates,[4] and although the duration of a parliament was coming to be regarded as limited to the session of the estates. For, while as late as the beginning of Edward III's reign a parliament might continue after the dismissal of the commons,[5] the concen-

[1] *Rot. Parl.*, i. 430.
[2] *Ibid.*, ii. 243; Nicolas, *Proc. of Privy Council*, ii. 307, v. p. xi.
[3] As late as December 1552 the charter granted to the Merchant Adventurers, and preserved in their hall at Bristol, has on it *per auctoritatem parliamenti*, although there had been no session since March. Cf. Elsynge, *Modus*, pp. 294–7, and below, p. 328 *n.*
[4] *Rot. Parl.*, ii. 304, iv. 334, 506.
[5] E. g. *Rot. Parl.*, ii. 65*b*. After the knights, citizens, burgesses and clergy had been given leave to go home (Saturday, March 21, 1331–2) on condition that the prelates, earls, barons, and councillors remained, proceedings continued "en pleyn parlement" on the Monday.

tration of attention upon common petitions led, before the end of the reign, to the adoption of the idea that the presence of the commons was essential to the continuance of a session of parliament. Out of this habitual reference of individual petitions by parliament to the council grew, in the latter half of the fourteenth century, the extensive jurisdiction of the council and indirectly of chancery, to which the council in turn referred the bulk;[1] and the specialization and differentiation of the functions of parliament began. In Edward I's reign all sorts of business had been transacted in parliament; the regular reference of individual petitions to the council and to chancery tended to develop the council's jurisdiction and to restrict parliament to legislation.

This division of functions likewise tended to limit the council's power of legislation. The means by which the commons secured[2] the enactment of their common petitions have already been indicated; it cost a longer and severer struggle to limit the council's power of legislation and enforce the necessity of parliamentary consent. Edward I's great legislation had been promulgated in assemblies which, if called parliaments, did not contain the estates, and the presumed recognition, in 1322, of the need for the consent of the commons to legislation has been exaggerated.[3] In 1327 we find a distinction made between statutes and other forms of legislation, and the idea is that a statute should be perpetual, while enactments of a more temporary character were expressed in letters patent.[4] But the differentiation between those petitions, or parts of petitions, which were to be made statutes and those which were to receive less solemn authorization was left to the council or to the judges as late as 1422, when the clerk of the parliaments was ordered to read to the council the acts passed at the late parliament, and then submit them to the two chief justices, who were to decide

[1] Cf. Baldwin, *King's Council*, pp. 241 *sqq*.

[2] Their success was, of course, only partial; the crown's power of veto was only limited by political expediency; it has never been limited by law except during the Long Parliament.

[3] See below, pp. 241–2.

[4] *Rot. Parl.*, ii. 12, 113.

which of them were statutes. These were to be proclaimed; the other "acts" were to be handed over to the clerk of the council, though all alike were to be enrolled, as was the custom, in chancery.[1] It was not till the sixteenth century that the crown lost the power of amending and modifying bills passed by both houses of parliament. In the fifteenth century the practice was extended, if not also begun, of drafting petitions in the form of acts, and we have frequent references to a bill or petition "in se formam actus continens"; but Henry VII himself, and even Elizabeth, occasionally took the liberty of adding provisos to, or otherwise modifying bills before signifying the royal assent.[2] There are three stages in the history of legislation: down to the reign of Edward I it is the act of the crown; then it becomes the act of the crown in parliament, and finally the act of parliament. At the end of the middle ages it is only in the second of these stages, and side by side with its power to legislate in parliament the crown possessed a concurrent right to legislate by ordinance independently of parliament, a power which had never been defined.

The original function of parliament as a gathering in which, according to Fleta, "judicial doubts are determined and new remedies are established for new wrongs, and justice is done to every one according to his deserts," tends thus, by the end of the fourteenth century, to be limited to the second object of enacting new remedies for new wrongs; and this restriction of function led to a restriction of its frequency. To the council and chancery parliament itself referred most of its business, and they sat throughout the four legal terms of the year. As early as 1348 it was ordered that individual petitions should be addressed to the chancellor and common petitions to the clerk of the parliaments.[3] Parliament need no longer meet thrice a year, as in Edward I's reign; and indeed, quite apart from this judicial transformation,

[1] Nicolas, *Proc. of Privy Council*, iii. 22.

[2] E.g. *Rot. Parl.*, vi. 275, 412, 460; my *Henry VII*, ii. 16–17; D'Ewes, *Journals*, p. 341*b*. Bills drawn up in the form of an act were apparently drawn on parchment (*Rot. Parl.*, vi. 288, 331).

[3] *Rot. Parl.*, ii. 201.

there were other causes tending to the infrequency of parliamentary sessions. The more popular and important an assembly it grew, and the greater the attendance of commons and the length of their sessions, the less practicable it became to hold three general elections and three sessions a year. Accordingly the three sessions a year of Edward I's time are reduced to about three in two years in Edward II's, to one a year in the middle of the fourteenth century, and in the fifteenth century to one in two, three, four, or even five years. This progressive rarity of parliaments is not due to the tyranny of kings, for it proceeds independently of the dynasty or particular monarch; it is due to a fundamental change in the character of parliament, to the specialization of functions previously performed by a rudimentary organ, and to the transference of most of the original work of parliament to the council and to chancery.

CHAPTER VII

PARLIAMENT AND NATIONALISM

THE loss of original functions through the transformation of parliament from a high court into a legislature diminished its usefulness and the reasons for its existence; and, pending the development of fresh grounds of action, parliament in the fifteenth century seemed to be treading the downward path of continental estates. Its sessions grew ever less frequent; from three a year they sank to one in every four or five years; and intervals of seven years under Henry VII and Wolsey, and of eleven under Charles I, might have been the prelude to a silence as prolonged and profound as that which fell upon national representation in France. Parliament itself showed no desire to insist upon its continuance. After the reference of most of its judicial work to the council, the need for supply alone made it indispensable to the crown; and if parliament had succeeded in enforcing its persistent demand that the king should "live of his own," it would have rendered its own existence superfluous. Nothing but compulsion on the part of the crown could get a parliament together; and as late as the sixteenth century ministers were wont to apologize to parliament for its summons. "What," asked Sir Thomas Smith in 1560, "can a commonwealth desire more than peace, liberty, quietness, little taking of their money, few parliaments?" [1]

The reluctance of parliament to assume responsibility was as marked as its unwillingness to meet, its haste to get home, or its anxiety to escape taxation; and the impotence that was the result of this slowness to serve might well have

[1] Strype, *Life of Sir T. Smith*, p. 192. Sir Nicolas Bacon in January 1563 claimed in parliament credit for the queen on the ground of her reluctance to burden the country with it (D'Ewes, *Journals*, p. 61).

explained its disappearance at the end of the fifteenth century. It had failed alike to check tyrants and to support constitutional kings. Good resolutions were the limit of its capacity, and they were short-lived. No parliament had offered successful resistance to the crown, and the troubles of Richard II, Henry VI, and Richard III came from other quarters. While parliaments were ever in opposition, rebellion and rival claims to the throne were always required to effect a change in government or in policy. In spite of the vaunted constitutional experiment of the Lancastrians, constitutional methods were, to the end of the middle ages, powerless to effect constitutional government. So far from the constitution being in all essentials complete in the reign of Edward I, it lacked the elementary means of working at all and was periodically being superseded by battle and murder. The constitutional ideal which Sir John Fortescue depicted at the close of the middle ages had little more relevance to the practice of his day than More's *Utopia* had to the government of Cardinal Wolsey.

The great service which parliaments rendered in the middle ages was not, in fact, to make England a constitutional state, but to foster its growth into a national state based on something broader and deeper than monarchical centralization, to make national unity a thing of the spirit rather than a territorial expression or a mechanical matter of administration, to evoke a common political consciousness at Westminster and then to propagate it in the constituencies. The value of parliaments consisted not so much in what members brought with them as in what they took away. Nationalism in the middle ages came nearer to Napoleon III's *la volonté de chacun* than to Rousseau's *la volonté générale*, and it was in and through parliaments that local and social prejudice was merged in a common sense. Every Englishman of to-day feels and realizes his nationality to some extent; the degree is a matter of individual imagination, education, and interest. Generally speaking, his attachment to his country overrides every other affection except, perhaps, his devotion to

himself and his family and in some cases his addiction to his religious or moral faith. But in the middle ages we are dealing with men whose nationalism came comparatively low in the scale of their affections. Men of the highest mind and character agreed with Archbishop Winchelsey that the loyalty they owed the pope came before the loyalty they owed the king. Barons were, as a rule, more devoted to their class than to either pope or king; the ordinary burgess or squire valued his local affinities more than his national bonds, and to the villager the parish was his world. When he threw himself upon his country—*posuit se super patriam*—his country consisted of his neighbours, and every one else was a foreigner. These symptoms are not yet extinct, and in very recent years a protectionist speaker was told by his Devonshire audience that it was not the " foreign " foreigner they disliked, but the Somersetshire foreigner; a similar feeling may even be traced with regard to the Mercians in the works of the vigorous West-Saxon who wrote the *History of the Norman Conquest*. The difference between modern and medieval Englishmen's patriotism is one of degree; in the middle ages locality preceded the nation, and it was through parliaments that the order was reversed.

The nation, like the child, began its education with what the Germans call *heimatkunde*. Intimate things were the first its mind could grasp. By the thirteenth century the normal range of the average freeman's imagination comprehended the shire, and his public activities were organized on that basis. He had to bear arms in the *fyrd*, but the *fyrd* could not be summoned to fight outside the shire except at the king's expense. He had to serve as a juror, but he could not be empanelled or forced to plead as a suitor beyond the county boundary. The county was his country, and both the political and the verbal distinctions between the terms are of modern growth.[1] Men fought as shires and

[1] Cf. R. Brunne, " the cuntre of Dorseth " (*c.* 1330), Caxton, " the countre of Leycester " (1480), Fitzherbert, " Leycestershyre, Lankesshyre, Yorkeshyre, and many other countreys " (1523) (*N. E. D.*).

thought as shires and judged as shires; they did nothing as a nation, and it is grotesque to speak of "England" doing anything at all before parliaments appeared, because there was no "England" capable of doing it. During the Norman period "England" suffers, but does not act; Henry II does much, but he spends nine-tenths of his reign abroad and represents France rather than England. The importance of Magna Carta consists, not in the nature of its provisions, but in the co-operation by which it was achieved. The movement against John was, however, spasmodic and feudal rather than popular, and the opposition to Henry III was also mainly baronial. It was not until Simon de Montfort and Edward I popularized parliaments that England became really conscious of itself and acquired the means of national action. Even then the action must not be exaggerated; there was no will on the part of the English people to determine or direct a national policy, and it was little more than a formal expression of national acquiescence that Edward I sought in parliaments. Consent, and not direction, was the object of its summons; and its importance lay in its unity, in the absence of rival parliaments and of provincial estates.

There are many aspects of this unity of the English parliamentary system. An attempt has already been made to indicate the significance of the fact which distinguished every English parliament since Edward I from all continental systems of estates, namely, the fact that it was not merely a *parlement* nor a system of estates, but both a court of law and a representative assembly, at once a judicial, a legislative, and a taxing body. This was perhaps the most fundamental element in the unity of parliament, but another was hardly less essential to its national character, and that was its comprehensive scope. Popular representation by itself has never been incompatible with monarchical despotism: provincial estates with representation of the *tiers état* continued in many parts of France throughout the *ancien régime* down to the Revolution of 1789. They continued in the Spanish-Austrian Netherlands throughout the same period,

and while Philip IV denounced estates-general as fatal to the principle of monarchy,[1] he and his successors permitted the innocuous continuance of provincial representation. The most despotic of German princes were equally complaisant, and even Von Ranke expressed a preference for *Landtag* over *Reichstag* which helps to explain the failure of the German empire to achieve responsible government. This monarchical predilection for provincialism is merely an expression of the despotic maxim *divide et impera*, and it illustrates the fact that provincial estates were not merely harmless to autocracy but dangerous to national self-government; they were, in fact, the principal enemy of estates-general, because by diverting to local objects the desire for self-government they weakened the strength of national co-operation. Nowhere did provincial estates, or estates-general where provincial estates existed, succeed in their resistance to the growth of monarchy in the sixteenth century.

The unity of the English parliament has been unchallenged for so many centuries that it requires some effort to realize the medieval danger of provincial estates. Yet the forces and temptations leading to such a developement were by no means inconsiderable. England before the Norman Conquest was rarely united under a single crown, and even when it was, expedients were occasionally adopted, like Cnut's four great earldoms, which were hardly less fatal than actual dismemberment to national unity. Long after the Conquest the divergences between England north and England south of the Humber were sufficiently strong to make their separation a possible contingency. It was a recognized line of administrative division throughout the middle ages, and as late as Elizabeth's reign northern catholics dreamt of an independent kingdom, or of dependence on the Scottish rather than on the English crown. The Pilgrims of Grace demanded a parliament at York, and Mary thought of removing her government thither for shelter and sympathy.

[1] "Les États généraux sont pernicieux en tout temps et dans tous les pays monarchiques sans exception" (Pirenne, *Hist. de Belgique*, iv. 401).

It was only by the hundred years' labours of the council of the north that the conservative counties north of the Humber were really made one with the rest of England. Further, there was the ecclesiastical model; and if parliament was moulded so closely upon the organization of the church as has sometimes been supposed,[1] there would have been two parliaments in the English state, as there were two convocations in the English church. Had the state imitated the church and constructed two parliaments in England, or had the church imitated the state and gathered its forces into one national assembly, the history of both church and state in England would have been fundamentally different.

Edward I did, during one misguided moment in 1282, set the perilous precedent of a double parliament, one for the north, meeting at York, the other for the south, meeting at Westminster. That neither he nor any of his successors followed this evil example was due to a number of causes connected with general English history. The unity of England is primarily the effect of the unity of its monarchy. Fortunately the Danish wars destroyed all royal houses save that of Ecgberht; Alfred the Great was not, like Hugh Capet, elected king by a group of rival princes, whose descendants might claim to be peers of the crown. Harold's usurpation might, if successful, have divided England as France was divided; but the most unruly feudatory of the French crown restored unity to England by the Norman Conquest. To the Conqueror there was little difference between West Saxon, Mercian, and Northumbrian; he had no more local prejudices than the Indian civil servant, who is making India a nation by the same steady application of common principles of government to diverse peoples as that by which the Norman baron and Angevin lawyer reduced to some appearance of uniformity the tribal perversities of their heterogeneous subjects.

Not only was monarchical unity secured, but all traces of the kingdoms over which rival houses had ruled were

[1] Cf. E. Barker, *The Dominican Order and Convocation*, 1913.

obliterated. When the West-Saxon kings acquired Mercia, Northumbria, and East Anglia, those realms were not retained, as Brittany, Normandy, and other French fiefs were, as administrative units. They were split up into shires controlled by the central government, and not permitted any provincial *parlements* or estates. Even in the most turbulent periods of English anarchy, the over-mighty subject had to rely upon scattered domains. A Geoffrey de Mandeville, a Thomas of Lancaster, or a Richard of York might wreck a government and overawe, or even seize, the crown; but they could not dismember England, because they could acquire no such consolidated fiefs as those upon which dukes and counts in France, Germany, and the Netherlands built their independence of national authority. The shires saved the unity of medieval England because they were controlled by the crown and did not foment provincial independence. They were the largest subdivision under the crown, and the great majority of them were given no earls. A dozen is the maximum number of medieval earls against thrice that number of shires. Two-thirds were directly under the crown, and even in those which had earls the king maintained a sheriff who took two-thirds of the proceeds of jurisdiction, leaving but one to the earl. It is the sheriff, and not the earl, who dominates the shire, and thus links the shire to parliament, instead of leaving it to develop feudal autonomy and provincial estates under the earl. The "palatinates"[1] which approached most nearly to the provincial organization of the continent were few, and were restricted to the borders. The rest of England was "shired," and this "shiring" did for the unification of England what the breaking up of the French provinces into departments achieved for the unity of revolutionary France.

The shire-organization, being the work of the central government, was naturally made the means of the development of common law and of parliament. It was in the

[1] The word is rarely used in the middle ages, though Anthony Bek claimed in 1293 to hold as a *comes palatinus*. The title *Registrum Palatinum Dunelmense*, which Sir T. D. Hardy prefixed to the four volumes he edited for the Rolls Series, was invented by him.

county courts that the royal judges appeared and applied the practice of the *curia regis;* it was the sheriff who carried that law into execution. It was there, too, that all elected members of parliament were returned; for the citizen and the burgess, though elected in his city or borough, was returned by indenture made with the sheriff in the shire court. The sheriff, as the local agent of the central government, received and returned the writs that emanated from the same monarchical authority. The members came to Westminster not as sent from sovereign constituencies, but as summoned by a sovereign lord; they attended not as delegates with imperative mandates to do what their constituents told them, but as the unfortunate and unwilling persons selected by their fellows to carry out the requirements of the crown. Their powers came from above and not from below, and their position was nearer to that of those persons selected for service under Militia Ballot Acts than to that of plenipotentiaries. Parliament in its origin had less to do with the theory that all power emanated from the people than with the fact that all people held their land directly or indirectly from the crown, and were bound by a corresponding obligation to obey its writs of summons and carry out its behests. It was the crown that put *ad faciendum* in their writs of summons, and it was the business of the crown they had to transact.

The crown by means of parliaments thus imposed a bond of unity upon the shires, and it was probably because there was only one *curia regis* and one king's council that there was only one parliament. Fortunately for England her administrative unity was achieved before her popular representation. Even so, had parliament been merely a system of estates, and had its original business been the granting of taxes, local patriotism might have insisted on local parliaments, where men could grant what they had to grant without a troublesome journey to Westminster. But their business was with a single series of national courts of law, king's bench, exchequer, and common pleas, sitting in common session. On occasion, at great inconvenience,

this session was held elsewhere than at Westminster, and wagons of records and other essentials wended their way to Nottingham, York, or Carlisle. But the greater grew the bulk of these records and the more specialized the machinery of government, the more serious was the inconvenience of migration, and except in 1282 the experiment of a divided parliament was never tried.

Englishmen from every shire were therefore brought together, generally at Westminster, once or more every year. It was not less important that they were gathered from various classes, and almost coerced into common deliberation on common objects; for division between class and class is not less fatal to national unity and self-government than division between province and province. Assuredly it was social rather than local separatism that explains, if it does not also excuse, both the weight of Bourbon despotism and the savagery of the French Revolution. For when class cannot act with class, no public opinion is possible and therefore no self-government; the necessary result is a common despotic authority, and when that despotic authority falls before revolution, the only check is removed from class hatred, which arises from lack of co-operation, and, in its turn, breeds suspicion and distrust. Every class in France during the first French Revolution was ready to believe that it was betrayed and that other classes were bought with Pitt's gold, because all classes in France were strangers to one another. Similar accusations, even if made, have seldom been believed in England, because all classes know something about one another; and that knowledge has come from centuries of co-operation between diverse classes in local and national government. It was not for nothing that the shire court was called a community, and the house of commons the community of communities. The house of commons is not, indeed, and never was, a haven of peace; feeling runs high and language is tempestuous; but when one leader accuses another of having no principles, it is not because they belong to different classes or have different codes of honour, but because they

belong to different parties and have to observe the conventions of party conflict. The gulf is easily closed at times of crisis and easily passed by individuals whenever they feel disposed.

The absence, or rather the confusion of class distinctions, which dates from before the Norman Conquest, was confirmed by parliament. The "estates" of which we read in its "Rolls" had little of caste rigidity; the judges, for instance, are called an estate, but in England judicial office never became hereditary, as in France, and such great offices of state as did become hereditary soon lost their importance. Prelacy also is called an "estate," but prelacy, like the judiciary, was always a career that was open to talent. Nor was there any demarcation of birth between the knights and bannerets, who sat in the house of commons, and the barons, who sat in the house of lords. Elected knights and bannerets were often "chivalers" and were commonly called nobles; there were "barons" of the Cinque Ports and of the exchequer who were not "peers of the realm," and the distinction between the "nobility" and the gentry of England in the fourteenth century was as vague as is to-day the meaning of gentleman. Even the serio-comic distinction, made by the College of Arms between those who have inherited or bought the right to bear arms and those who have not, had not been invented. Co-operation and community of sentiment were thus comparatively easy; and the separatist tendencies of deliberation by "estates" were checked by the common action which followed it in the parliament chamber. In 1332 we read, for instance, that the estates first answered separately *et puis tous en commune*;[1] and although acts of parliament are now made law by the royal consent given in what has come to be called the house of lords, the presence of the Speaker and some of the commons, which is always required, still bears evidence to this common action of all the estates. It was in parliament that differences of local and class sentiment had to be accommodated

[1] *Rot. Parl.*, ii. 67.

and fashioned into a national determination; and the result was effected more and more by mutual interchange of views, less and less by the arbitrament of a superior authority. Far more of the work of parliament was done by conference in the Painted Chamber or elsewhere than was the case after the amalgamation of the various estates and the severance of parliament into two houses.

The fluidity of medieval ideas about "estates" facilitated the unifying work of the crown in parliament. Their number and the vagueness of their delimitation, which depended more upon royal writ than upon any question of status, hindered the adoption of the continental theory, that the assent of each estate was essential to legislation. It is true that phrases expressing the assent of the lords spiritual and temporal and the commons in parliament assembled came to be customarily used in acts of parliament; but it is certain that their employment had not become essential by the end of the fifteenth century, and a great deal of legislation was passed as late as the reign of Henry VII without any further testimony to its legality than the fact that it had been enacted by the king in parliament.[1] Moreover, the "assent of the lords spiritual and temporal" did not mean their several assent, and the validity of the statutes of provisors and præmunire, as well as of Elizabeth's acts of supremacy and uniformity, depends upon a repudiation of the theory that the assent of the lords spiritual was requisite for such legislation. For no other "estate" has the claim ever been made. The assent of the lords was sought, not because they were one or two "estates," but because they were *consiliarii nati* of the crown. The assent of the commons was claimed as necessary not on the ground that they were an estate, but because they were the *communitas communitatum*.

[1] Cf. my *Reign of Henry VII*, vol. i. p. xxxii, iii. 199–200. A more scientific study of the development of legislative forms is badly needed. Even the editors of the *Statutes of the Realm* have sometimes preferred one MS. of a statute to another, on the ground that it embodied modern legislative phraseology, although that fact is evidence of its later date. The stereotyping of this phraseology has been considerably ante-dated, and the constitutional importance of the middle ages has been magnified by attributing to them not a little modern achievement.

Taxation was, of course, a different matter. For the ordinary revenues of the crown, such as feudal aids, regular customs, and so forth, no consent was necessary; they were "the king's own," and he was not only entitled to have them, but expected to live on them. Other taxes were matters of voluntary grant, and their history is bound up with the gradual growth of the right of the majority to bind the individual. Peter des Roches, in Henry III's reign, successfully claimed immunity from a tax on the ground that he as an individual had not consented to its levy. We have no knowledge of the important process by which this extreme view of the rights of "liberty and property" was surrendered, and the right of an "estate" to bind its individual members by a majority vote was established. The principle had been recognized in Magna Carta, and taxation by "estates" was the regular practice in medieval parliaments. It was but slowly that taxation was nationalized: each estate made its own grant, and no estate could bind any other. But the "estates" which voted taxes were limited in number; the judges did not tax themselves separately, nor did the prelates, who taxed their temporalties with the temporal peers and their spiritualties in convocation. On the other hand, the merchants, who were not an estate in parliament, often arranged their own taxation. Nor did the class-taxes that were voted correspond with this or any other division of estates: the taxes granted by the knights of the shires were, like those granted by the lords temporal and the lords spiritual in parliament, mainly taxes on land; citizens and burgesses for the most part granted taxes on chattels or moveables, while merchants paid on their merchandize. But the original distinction in kind between danegeld, carucage, tallage and so forth was passing away with the change of land from a source of men into a source of wealth, the acquisition by tenants-in-chief of vast flocks of sheep, and the purchase of land by citizens and burgesses. The effect of this confusion was to break down the system of class taxation: each estate would have to grant and pay various kinds of taxes, and while each continued for a time to grant its own,

the development of common action in the commons' house led to common taxation. The knights join with the town representatives, and together they succeed in depriving the merchants of the right of separate taxation. The church consolidated its claim to grant all its taxes, temporal as well as spiritual, in convocation and to collect them itself;[1] while the peers, in return for their legislative share in general finance, acquiesced in the taxation of their possessions by grants originating in the commons. Taxation was thus, by the end of the middle ages, a national act, except in so far as the church was concerned: its taxes were granted in two provincial convocations; the laity were all taxed together by act of parliament. The grant for all is made by the commons with the consent of the lords; but it takes the form of a statute, and the sanction behind it partakes less and less of the nature of a gift by the representatives of those who have to pay, and more and more of the authority of a sovereign legislature. In taxation, as in other matters, the "estates" become one, which is called the state, and national unity takes the place of class diversity.

A similar process affected the growth of legislation. Before parliaments existed, the granting of charters by the crown had exhibited the same tendency to expand from individualism and particularism to collectivism. The earliest charters are to individual persons or boroughs; then come charters to classes, such as tenants-in-chief and merchants, and finally the great charter, which at any rate mentions all classes of the community. The confirmation of the charters by Edward I marks the culmination of the charter and the point at which the charter merges into parliamentary legisla-

[1] See my *Reign of Henry VII*, ii. 39–43. The law does not, however, appear to have been clear on the matter. In 1480 the judges held that grant by the commons was valid without the consent of the lords (*Year Book*, 21 Ed. IV. p. 48; Hallam, *Middle Ages*, ed. 1878, iii. 108 *n.*). Possibly anti-clericalism assisted their decision, for the validity of the grant was contested by the church in the interest of some property that had been left it. So long as lords and commons made separate grants, the assent of the lords would not be necessary; it was different when lords and commons were taxed by the same grants and when taxation took a definite legislative form.

tion. Here, too, the individual petition comes first, and gradually merges into petitions which are common, except that the church is reserved. It is not, of course, that all legislation is general or public, but all legislation is backed by the commons. The distinction is clearly marked in the last volume of the "Rolls of Parliaments." About half the petitions are common; the rest are presented by the commons *ex parte*, on behalf of some individual person or corporation.[1] The former become public, the latter private acts; and this familiar differentiation is first adopted in the sixteenth-century statutes, although the principle of discrimination is not that adopted to-day: and grants of taxes to the crown are often, in Henry VII's reign, classed as private acts. Still they are all acts done in a national parliament, and that is the recognized method of making secular law at the end of the middle ages.

This nationalization of politics was fatal to the medieval conception of jurisdiction as something inherent in lordship of the land; and by a process which has never been traced in detail parliaments developed a practice of making their legislation applicable *tam infra quam extra libertates* within as well as outside liberties. Gradually the distinctions between one franchise and another, and between all franchises and the remainder of the realm, were whittled away; and ideas of legal uniformity and of equality before the law begin to find expression in phrases that meant more than the old and empty platitude *omnes homines natura æquales sunt*. The King of England, the Emperor Charles V was told in 1551, had but one law by which to rule all his subjects,[2] and that was law made in parliament. Nothing could be less medieval: a contour map of medieval England indicating the various heights of jurisdictional privilege would have revealed an infinite diversity of inequality; and a vast and patient work of levelling was required before the king's writ ran throughout the land and reduced its people to equality in his courts of law. But the equalization of

[1] E.g. *Rot. Parl.*, vi. 290–2, 294, 298, 331.
[2] *Calendar State Papers*, For., Edward VI, p. 137.

liberty by means of parliament must be reserved for separate treatment, and so must the nationalization of the church, the greatest of medieval liberties and the latest of the spheres into which parliament ventured to intrude.

Parliament was, of course, no more than the instrument of comprehensive social, economic, and political forces. It had little to do directly with the nationalization of language and literature, without which there could have been no national state, though it can hardly be doubted that the association of men from all parts of the country in common discussion at Westminster assisted the adoption of a common standard of speech and common habits of thought. Parliamen t,too,had something to do with the nationalization of defence, whereby that obligation was converted from a burden imposed upon locality and class into a common duty.[1] Resistance to this development was long in dying down. Cornwall, in Henry VII's reign, rebelled rather than acknowledge its liability to taxation for the defence of the Scottish borders; and Hampden's case against Charles I was largely based on evil precedents which distinguished between the obligations of inland and those of maritime counties for naval defence. Similarly, the northern counties were under special liability for the defence of the borders, and were entitled to corresponding privileges. Particularism was of the essence of the middle ages, and it was only broken down by the common spirit developed in parliaments and by the common taxation they provided for national objects.

Every national state has necessarily undergone processes

[1] Particularism, however, often found expression even in parliament. In 1339, for instance, the commons disclaimed all obligation for the protection of the Scottish Marches and the keeping of the Narrow Seas (*Rot. Parl.*, ii. 103). If the Wardens required assistance, it should be provided, the commons contended, by the great council, without charging "la commune"; and as for naval defence, it was the business of the barons of the Cinque Ports, who for that purpose possessed "honours" above all commoners of the land, did not contribute to the aids and charges touching the land, and took endless profits arising from the sea. Therefore they should guard the sea as "la commune" did the land, without pay, as other towns and havens which had navies were bound to do (*ibid.*, ii. 105).

of nationalization. In some the process has been sudden and revolutionary, and the fusion has taken the form of an explosion. In others the nationalization has proceeded on purely monarchical lines and has thus produced a despotism. In England the process was slow and parliamentary. Had England developed a system of estates independent of its judicial parliament, had its representative systems and its parliaments been provincial and manifold, as in France, the bond of national unity could only have been forged here, as abroad, by the growth of royal authority. The union would have been personal, not parliamentary: it would have resembled the unions between France and Brittany, or England and Scotland in 1603, and not that between England and Scotland in 1707; and where the bond of union is the person of the sovereign, liberty cannot be safe; because for the sake of unity men will strengthen the bond of union and thus enhance the authority of the crown.

Charles I might have succeeded could he have played off a parliament of the north against another of the south; and a diversity of parliaments would have rendered each one of them weaker against the crown, as well as less national in its outlook. When the estates-general of France had sunk into abeyance, the *parlement* of Paris aspired to play the part of its English namesake. It failed because, save for the name, the two bodies had little in common. The *parlement* of Paris was but one of many French *parlements*, and it had long excluded all representative elements from its closing doors of privilege. In England all the estates had entrenched themselves in the high court of parliament, and had used its judicial machinery of impeachment and attainder with deadly effect against the royalist champions. The English estates were the grand jury of the nation, because they sat in a parliament which was a court of law. There was no national presentment of offenders in France, because the *parlements* excluded the estates, just as lower French courts extruded the jury. The time-honoured maxim that union is strength has nowhere been illustrated in such a variety of aspects as

in the history of the English parliament. It has embodied a national union of law and politics, of class and class, of province and province—a union slowly and painfully achieved in the course of ages, and not under the sudden stress of emergency. In part the creation and in part the creator of English nationality, the English parliament is the essence of modern England.

CHAPTER VIII

THE GROWTH OF REPRESENTATION

THE fundamental difference between the English and other parliaments lies, we have seen, in the fact that it combines a system of popular representation with a high court of justice. Unlike all other courts of justice, it is therefore representative, and unlike all other representative assemblies, it is a court of justice. Further, the court was also the council, and a parliament was a joint session of executive, judicature, and legislature. This connexion between the governing and representative bodies was indispensable to national democracy. City-states can govern themselves by direct action without representation. National states can be maintained without representation, but without it they cannot govern themselves or determine national policy. Aristotle's maxims about the limited size of a state are sufficiently familiar; but they are all based on the assumption that a state cannot be self-governing unless the citizens govern directly, and themselves fulfil the functions of legislators, judges, generals, and admirals. According to the Athenians, the state required the whole life of its citizens; they were to be ready to undertake any political duty, and every other claim on their time was subordinate. A man who had to earn his living should be precluded from citizenship, because he lacked time and energy for public activity; and the occasional exercise of a vote at the polling booths would have seemed to them a poor qualification for citizenship. This conception in itself was fatal to modern ideas of democracy, because the mass of producers were excluded from political rights and duties; in Athens they

were largely slaves, and Athenian democracy was really an aristocracy based upon the most odious of class distinctions. No doubt it rendered a high ideal practicable for the favoured few, who were expected to realize themselves and attain their highest individual development in the service of the state. But even the capacity of virtue was denied to the slave and the mechanic; an impassable gulf was fixed between them and the citizen; most men were slaves by nature, and such they must remain. The non-Greek peoples were called barbarians and excluded from the scope of Greek morality.

The Romans were more cosmopolitan; they disbelieved in this natural inequality of men, and Cicero thought that all men were capable of progress and of virtue. But the absence of any idea of representation prevented the realization of these comparatively liberal views in the expanded Roman state. Rome as a city could be democratic, but not as an empire; and the wider grew Rome's dominion the more autocratic grew its government. The more its sway expanded, the more did its governing class contract. Direct popular participation in politics can never be more than municipal in scope, and the city-democracy that tries to govern an empire fails in its task and incidentally ceases to be a democracy. Athens, Rome, Venice all point to the incompatibility of *imperium et libertas* when either is divorced from the principle of representation.

The evolution of this principle has, therefore, provided an escape from the dilemma upon either horn of which every ancient state was sooner or later impaled, has rendered possible the national democratic state, and has reconciled liberty and empire; and the credit for this discovery has been claimed for political or ecclesiastical theorists of the middle ages. Representation has been regarded as a great democratic principle first elaborated and applied in the organization of the friars and particularly of the Dominican Order in the thirteenth century, and its adoption for parliamentary purposes has been ascribed to the influence which Dominican confessors exerted over the minds of English

kings and statesmen.[1] The part played by theorists in the practical development of human affairs is a question upon which theorists are apt to differ from other people; but probably the theorist, especially if he has been fortunate enough to possess a great gift of literary expression, has received more than his share of responsibility for the good and evil in history. Machiavelli is believed to have corrupted the politics of the sixteenth century, Locke to have prepared men's minds for the Revolution of 1688, and Rousseau to have stimulated that of 1789. It is well to remember that Machiavelli's *Prince* was not written until real princes had given the most striking manifestations of his principles, that Locke's *Two Treatises* were published two years after the Revolution of 1688, and that Rousseau's resonant phrases were borrowed from ancient Roman law. It was the aptness of these doctrines to the conditions of the time that gave them their vogue, but they did not create the conditions, and in other circumstances would have fallen on stony ground. The soil is not less important for the harvest than the seed, and in the case of political ideas the seed is in the air, blown by the wind, and not sown by the hands of individual men.

Representation is, moreover, an ambiguous word which needs to be defined before we can deal with its development. It does not necessarily imply election. When Emerson wrote his *Representative Men* he said nothing about a popular vote; nor was Hobbes thinking about the franchise when he described the sovereign as the representative of all the citizens. Charles I on the scaffold claimed to be the true representative of his people; and the house of lords has not infrequently made the same claim against the house of commons. In Germany after 1815, when the constitution of various German states was under discussion, it was contended that the peasantry needed no special representation because they were adequately represented by their landlords; but there was no suggestion that landlords should be elected by their tenants. Nor does election necessarily

[1] Cf. E. Barker, *The Dominican Order and Convocation*, 1913.

mean popular election: the Calvinist commonly talks about the elect, but they are not chosen by ballot. Election does not, in the middle ages, reveal the person of the elector, and means no more than selection by the persons authorized to select. It is a matter of common knowledge that knights of the shire were selected in the county court, but by whom they were really chosen is merely a matter of surmise.

It is idle to seek the origin of representation in its vaguer sense; for the representation of states by their governments and ambassadors is almost co-eval with the state itself, and when Hobbes writes of the sovereign representative he is expanding the Roman juristic maxim *quod principi placuit legis habet vigorem . . . utpote . . . populus ei et in eum omne suum imperium et potestatem conferat.* Cæsar was omnicompetent because Cæsar was the repository of every citizen's powers; he was the universal agent, the representative of all. It was in this sense that the feudal lord represented his tenants and that the priest and four "best" men represented the village community in the hundred and shire-moots; and it is only in this sense that parliaments were representative during the earlier periods of their existence. Modern ideas of representation assume that the representative is bound by the will of the represented, but the will of the people is a modern fact which largely partakes of fiction. There seems in the middle ages to have been a total absence of direction and instructions from constituencies to their members. Election promises were unknown, and they appear in their earliest form in sixteenth-century undertakings on the part of candidates to serve without exacting the wages their constituents were legally bound to pay. They were elected to bind their constituents, and not to be bound by them; they were to come empowered to execute the proposals of the crown, and not to impose upon the crown the proposals of their constituents. The growth of the popular will is the most important, obscure, and neglected content of English domestic history. It takes place behind and under the forms of representative government; but the form of government no more reveals its controlling power than

the structure of a ship tells us whether it is run by the captain or the crew, and our representative parliament has been the instrument in turn of king, lords, and commons. It is easy, therefore, to exaggerate the importance of representative forms in the middle ages. On the other hand, it should not be ignored; the development of the machinery of the constitution was important before the people had learnt to drive it, and no democracy has ever constructed a workable constitution until it has been taught the elements of politics.

The earliest forms of English representation appealed to the interests of the government and the selfishness of the majority rather than to popular ambition. The "best" men, who were required by royal ordinance to attend the local courts, were certainly not elected; they may have been a sort of local hereditary aristocracy, like the twelve lawmen of Chester and Lincoln, of whom we read in Domesday. Under the Norman and Angevin kings they were probably the holders of the "best" tenements, and the obligation to do suit at the county court was attached as a condition to certain holdings. Representation was, in fact, an unpleasant incident of feudal service.[1] This is the popular attitude in the middle ages towards parliament, as towards the shire court; it is not a question of who is anxious to serve, but of who is obliged to attend.

The business to be done is also that of the crown; it is the king's writs by which the suitors are summoned, and it is mainly the "pleas of the crown" that are heard in the county court. No doubt humble folk are interested in having justice done, but it is the crown which discovers that *justitia magnum emolumentum.* Justice is done for the sake of its proceeds, and representation is used by the crown for purposes of justice and finance. The county court consists of jurors, who represent the county; *ponere se super patriam* is to go throw oneself on a jury, and the verdict of the jury is the county's act. It is also upon the county that taxation is later imposed, and its re-partition among the

[1] See above, p. 109.

smaller communities is left to the county court or to the sheriff. But attendance is all a matter of service determined by tenure. By a statute of 1294 it is enacted that no one with less than forty shillings a year in land can be empanelled on a jury in the county court.[1] The boon consists in the exemption of the poor; but the burden becomes in time a franchise. These jurors elect the knights of the shire in the court to which they are summoned for jury-service, and in Edward I's statute we have the origin of the forty-shilling freehold vote. In 1430 the vote has become a privilege, and a famous statute prohibits its exercise by those whom Edward I had freed from jury-service. The important point is that every voter is first a juror: he is only a voter because he is a juror; he can only enjoy the franchise because he discharges an obligation. The vote is not a matter of individual right, but of duty to the community.

The idea that any one had a right to a vote would have been unintelligible in the fourteenth century, and its discussion would have seemed as irrational as the question whether a man has a right to serve on a jury to-day. He may have, but the point does not arise, because no one thinks of claiming the right. Men are more concerned with their liability to be summoned; and it was his liability to attendance at the shire court and to election as member of parliament that troubled our medieval ancestor. Whether he was a baron liable to individual summons or a knight or a burgess liable to election, he was anxious to escape the liability; and the constituencies were of like mind. Sometimes a recorder was bound by the terms of his appointment to serve the borough in parliament and thus relieve the burgesses. The two knights for Oxfordshire who fled the country on their election to parliament exemplified a common frame of mind among the elected, and Torrington, which secured a charter giving it perpetual exemption from

[1] *Rot. Parl.*, i. 116. Forty shillings had previously been made the limit of suits over which the county court had jurisdiction (Pollock and Maitland, ii. 540–1).

representation in parliament,[1] typified the attitude of the electors. The shires could not expect such favours, and their representation remained constant throughout; but the 166 cities and boroughs from which Edward I had summoned representatives to parliament had sunk to less than a hundred in the reign of Henry VI. The number of members was smaller than these figures would indicate, for sometimes, to save expense, Cornish and Devonshire constituencies returned identical members.[2] Local parsimony prevailed over national interest. Not only did the borough which evaded representation escape the liability for members' wages, but it got off with lighter taxation. Boroughs which were represented only by the knights of the shire were taxed with the shires, and paid a fifteenth, while boroughs with representation of their own had their own taxation and paid a tenth. Parliamentary ambition was a feeble incentive when representation meant extra taxation, and when attendance at Westminster involved responsibility without power or profit. Parliament was not then a career, and it opened no paths to promotion. Members were men of business reluctantly diverted from their private affairs for occasional public service; and the few who aspired to political eminence had to choose the church or the service of the king or of a baronial magnate.

Representation, in fact, was nowise regarded as a means of expressing individual right or forwarding individual interests. It was communities, not individuals, who were represented, just as it was communities and not individuals who were taxed in parliaments. The poll-tax, when it appeared in 1380, was resented because it was a departure from the old tenths and fifteenths which were levied on boroughs and

[1] *Rot. Parl.*, ii. 459*b*; Maitland, *Const. Hist.*, p. 174; the exemption was secured in 1366 and confirmed in 1368 (*Cal. Patent Rolls*, 1364–7, p. 246, 1367–70, p. 115). Edward III, in granting the petition of the men of Torrington, remarked that "vos ea occasione laboribus et expensis multipliciter gravati fuisti, ad vestrum damnum non modicum et depressionem manifestam."

[2] See J. J. Alexander in *Trans. Devon. Assoc.*, 1910, xlii. 260. In 1362 one John Hill was returned for six Devonshire constituencies, and John Wonard for two Devonshire and two Cornish seats.

shires and were not imposed *viritim*. The re-allotment of the burden of taxation, like the determination of the borough franchise, was a matter for local option and arrangement; and there was the greatest variety in both spheres. The statute of 1430 regulated the county vote on a national uniform principle; but until 1832 no attempt was successful to introduce uniformity into the borough franchise. In some boroughs the parliamentary franchise was limited to members of the governing body, in some to the "freemen"; in others it was extended to all who held burgage tenements, or even to all who paid scot and lot. This local diversity adds to the difficulty of the discussion whether women possessed a vote in the middle ages. That women could sit in parliament is certainly unproved, and the fact that the husband of a woman who held an entire barony was liable to a special writ of summons implies that she was exempt. The instances of women appearing in parliament, upon which reliance has been placed, relate to its judicial functions, and women still frequently appear in courts of law. The vote, it must be remembered, was grounded in jury-service, and unless it can be shown that women were personally liable for that and other forms of service, there is no reason to suppose that they exercised a parliamentary vote.

Nevertheless women did occasionally return, or assist in returning members to parliament, not because women's right to vote was admitted, but because it was the land rather than men that parliament represented, and occasionally women held the land upon which the burden of representation had been fixed. Feudal service was always regarded as due from the land rather than from the individual tenant, and so long as the crown obtained its service it cared little who performed it. The liability was first the lord's, who generally passed it on to his tenants; but if tenants were lacking, the obligation reverted to the lord. Thus by the sixteenth century the borough of Gatton had lost all its burgesses, but retained its parliamentary obligation of service. The return was, therefore, made by means of indenture between the sheriff and lord of the

manor; and once, at any rate, during the minority of her son, it was made by Dame Alice Copley. In dealing with medieval representation we have always to think in terms of feudal service rather than in those of democratic principle. The boroughs are represented because they are collective tenants-in-chief on the king's demesne; and the shires, too, are in a sense tenants-in-chief, in that they "farm" the royal rights of jurisdiction. Parliament was the king's head court,[1] and it was composed of those who owed service to the crown.

But the feudal form was filling with the breath of national life and popular consciousness, the outcome of the fourteenth century and the sign of the passing of medieval things. The growth of a national literature illustrated by Chaucer and still more by Langland, and of a desire for national expression in religious thought exemplified by Wycliffe's works; the substitution of a national weapon, the longbow, for the mailed knight and the feudal castle; the development of industry and commerce at the expense of the agricultural monopoly of wealth; the triumph of national feeling over local particularism during the Hundred Years' war; the effect of the mobility of labour in breaking down manorial isolation, all made themselves felt in the parliamentary sphere. Classes that had been ignored were forcing their way into politics, and the beginnings of popular education were fostering a wider-spread national intelligence. The foundation of great schools and colleges and the growth of universities are familiar illustrations of this spirit. Not less significant was the fact that villeins, although they might be fined by their lords for so doing, were beginning to send their children to school.[2] Thus Langland found an audience, and the English people discovered itself. Prosperous villeins who sent their

[1] This phrase was used by James I (Prothero, *Select Statutes*, etc., 1898, p. 400), but not, as implied by Dr. Prothero, of the English Parliament. It occurs in his *Trew Law of Free Monarchies*, which dates from 1598, five years before James became King of England (see McIlwain, *Political Works of James I*, Harvard Univ. Press, pp. xxv, 62).

[2] In 1372 a customary tenant was fined heavily by his lord (who was a bishop) for putting his son to school without the lord's leave (Maitland, *Collected Papers*, ii. 399).

sons to school attended the county court themselves, and contributed to the tumultuary elections which led to the restricting statute of 1430. Similar irruptions into the oligarchical circles of municipal government led to corresponding restrictions of the municipal franchise.[1] These restrictions were less important and less permanent than the movement by which they were provoked, and their significance lies in the indirect evidence they provide for the growth of a political consciousness among the mass of the population. It may have been a sign of grace when the commons complained in 1436 that sheriffs often returned members who had not been elected.[2]

Probably here we have also the explanation of the curious fact that about 1445 the ebbing tide of parliamentary representation begins to turn, and the number of boroughs returning members to increase. The lowest limit was reached in 1445, when only ninety-nine made returns; Henry VI added eight and Edward IV five. Henry VII apparently made no change,[3] but under the later Tudors the increase was rapid and steady. Later on we shall see that the attribution of this increase to Tudor designs upon parliamentary independence is not a tenable theory; and even if it were, their attempt would illustrate their appreciation of the importance of parliamentary support. It is more probable that the creation of new boroughs, and restoration of parliamentary representation to others which had lost it, was due to a deeper national impulse. We have at least one protest from a Tudor secretary of state that there were too many members already, a refusal to listen to Newark's petition for representation, and a hint that the government in 1579

[1] See my *Reign of Henry VII*, ii. 181–5, for restrictions on the borough franchise at Leicester and Northampton.

[2] *Rot. Parl.*, iv. 507.

[3] The difficulty of tracing accurately the growth of parliamentary representation is increased by the defectiveness of the lists of members printed in the *Official Return*. There are no lists between 1477 and 1529, although research among borough archives and elsewhere may help to supply the deficiency. Something may also emerge from the neglected records of the Crown Office recently transferred from Westminster to the Record Office.

contemplated the abolition of rotten boroughs.[1] The demand for representation now came from below, from prospective electors themselves or from neighbouring magnates seeking an easy seat in the house of commons. Boroughs were bought up in the sixteenth century; the eldest sons of peers became candidates for election; the proceedings of the house were considered worth recording in *Journals;* candidates offered to serve without their wages; and even bribed the electors, not to escape, but to secure, election. Men no longer fled the country when elected, or transferred their liabilities to their tenants. A member of parliament had become an important person, a seat in the house an object of ambition, and the house itself a place of political power. The seats of the mighty were filling with popular candidates. Elections were contested, and electors were canvassed; boroughs refused to accept neighbouring magnates' nominees, and riots were not infrequent. The burden of representation had become a privilege, because people had grasped the fact that through it they could impose their will on the crown, instead of the crown through it imposing its will upon them. The forms of the partnership remained, but the predominance was changing hands.

National spirit had fused local prejudices. Members are regarded as serving their country and not merely their shires or boroughs; and residence ceases to be an indispensable qualification. The legal requirement stood, and the matter was often debated in the house; but the national view prevailed over the letter of the law, and parliament was saved from the dead hand of medieval parochialism. Other influences, no doubt, contributed to this result; insistence upon residence would have defeated aristocratic designs on the commons, and have excluded many privy councillors

[1] T. Wilson to the Earl of Rutland, June 17, 1579 (*Rutland MSS.*, Hist. MSS. Comm. i. 117): "I have moved the Queen for the town of Newark, and have obtained her consent that the book shall be engrossed by Mr. Attorney, and all the articles allowed, save the nomination of two burgesses. It is thought that there are over many already, and there will be a device hereafter to lessen the number for divers decayed towns." Newark did not obtain parliamentary representation until 1673 (*Official Return*, i. 526).

of the crown. But the substitution of landed gentry for timorous townsmen stiffened the back of the commons, and is definitely assigned by a Venetian ambassador as the cause of the recalcitrance of one of Mary's parliaments;[1] and even the election of privy councillors testified to the growth of popular influence. In Edward I's reign a councillor was summoned *ex officio* to parliaments, and a parliament was a meeting between council and estates. Now, instead of sitting *ex officio*, the privy councillor sought popular election, and in Thomas Cromwell and William Cecil we have the first striking examples of the "old parliamentary hand"; both sat continuously in the commons until they were raised to the peerage, and both were there in the interests of the nation and not in those of their constituencies. The *communitates* have become the *communitas*, England is one whole instead of many parts, and in politics and history the whole is greater than the sum of all the parts. Out of the fusion arises the national patriotism of Elizabethan England.

The sixteenth century is indeed the great period of the consolidation of the house of commons, and without that consolidation the house would have been incapable of the work it achieved in the seventeenth. Under the Tudors it becomes a compact and corporate unit, and acquires a weight which makes it the centre of parliamentary gravity. Its transference, in Edward VI's reign, from the chapter house to St. Stephen's chapel[2] brings it under the same roof as the parliament chamber, and provides ocular demonstration of its position as an integral part of parliament. The commons no longer *comparent in parliamento* by traversing the street between the abbey and parliament with the Speaker at their head; they are already "in parliament" when they meet by themselves, and their domestic discussions become parliamentary instead of extra-parliamentary proceedings. Each representative is now a limb, a "member" of parliament, a phrase which appears in the fifteenth

[1] *Venetian Calendar*, vi. 251.
[2] See below, p. 333.

century,[1] was used by Henry VIII when vindicating the privileges of the commons, and gradually secured a popular vogue; and a prominent member is described in Elizabeth's reign as "the great parliament man." The house is a national representative: every Englishman is "intended," in Sir Thomas Smith's phrase, to be present either in person or by proxy; and the house derives its authority from the fact that it embodies the will of the English people. The laxity which in the middle ages put up with the absence of a majority of elected members, and assumed that absence, like silence, gave consent, was no longer tolerated. The clerk kept a book of attendance: no member was allowed to go home without leave, and those who did so were prosecuted before the king's bench. Down to 1558 the leave had to be obtained from the crown; in Elizabeth's reign it begins to be granted by the house itself.[2]

Slowly, too, the house developed a corporate consciousness bred of prolonged and intimate association. The medieval parliament was an affair of weeks; it seldom had more than one session, and members rarely sought re-election. Every house was, therefore, a body of strangers, speaking perhaps incomprehensible dialects, distrustful of one another, here to-day and gone to-morrow, never, in most cases, to meet again, and utterly unable, on account of their transitory existence, to acquire confidence in one another or to develop leadership and parliamentary skill. On rare occasions before 1509 a parliament was called back for a second session; but it is during the reign of Henry VIII that the modern practice begins, and it begins with the parliament that wrought the Reformation. Summoned to meet on November 3, 1529, its existence was continued until April 4, 1536, and during that period it held eight sessions extending over more months than the days of the average

[1] *Rot. Parl.*, v. 240, vi. 191; cf. Smith, *De Republica Anglorum*, ed. Alston, p. 63.

[2] A bill to control the unlicensed absence of members passed the commons, but not the lords, in January 1554–5, and three similar attempts were unsuccessfully made in the following session (*Political History of England*, vi. 147–8), and yet another on November 9, 1558.

medieval parliament. By the end of that period members of the house of commons must have acquired a familiarity among themselves, a knowledge of parliamentary procedure, and an acquaintance with national politics such as no house of commons had ever possessed before. The experiment was unique in the sixteenth century, but a later parliament of Henry VIII had four sessions, and the first of Edward VI had three. Mary saw fit to change her parliaments with greater frequency, and five were elected during the five years of her reign, only one of which met for a second session. Elizabeth had not her father's faith in parliament; but most of her parliaments sat for more than one session, one session lasted over three months, and one parliament was undissolved for nearly nine years. The leading members, moreover, both of the government and of the opposition, are constantly re-elected; the ordinary *personnel* of the house grew more stable; and if Cecils and Bacons placed parliamentary experience at the service of the crown, Nortons and Wentworths used it on behalf of the liberties of the commons.

Internal consolidation was accompanied by expansion, and the number of members increased during the Tudor period by more than fifty per cent. There were fewer than three hundred when Henry VII ascended the throne; there were more than four hundred and fifty when Elizabeth died. Henry VIII added eight members to the representation of Lancashire, two each to London and Middlesex, Cornwall, Norfolk, Suffolk, and Buckinghamshire, and one to Shropshire; he "shired" Wales and Monmouth and introduced twenty-four Welsh members to parliament; he also incorporated Cheshire, and even extended the parliamentary system to Calais, leaving the county palatine of Durham alone outside the national organization.[1] Edward VI added fourteen members to Cornwall, four to Northamptonshire, and two each to Hampshire, Yorkshire, Lincolnshire,

[1] A bill "to have two knights from Durham into the parliament" was introduced in the house of commons on January 18, 1562–3, but apparently got no farther.

PARLIAMENT IN THE 17TH CENTURY.

Cheshire, Staffordshire, and Wales. Mary increased the representation of Yorkshire by ten members, that of Oxfordshire by three, of Kent, Northumberland, Norfolk, Hertfordshire, Buckinghamshire, and Worcestershire by two each, and of Northamptonshire and Berkshire by one apiece. Elizabeth's additions amounted to fifty-nine against forty-five made by Henry VIII, thirty by Edward VI, and twenty-seven by Mary; sixteen new members went to Hampshire, twelve to Cornwall, six to Suffolk, four each to Kent, Yorkshire and Lancashire, two each to Devon, Notts, Gloucestershire, Shropshire, Staffordshire, and Surrey, and one to Wales. It was reserved for James I to grant special representation to the universities of Oxford and Cambridge, which gratefully elected his nominees; but by 1603 the house of commons was more completely representative than it had ever been before, and in spite of the acts restricting the franchise it is probable that the electorate was also growing wider. The amount of free socage was increasing in the counties, and the bar of serfdom was steadily being removed; at the disputed Norfolk election of 1586 three thousand voters are stated to have been present,[1] though in the boroughs the widening of the franchise had to await the period of the Long parliament and the Commonwealth.[2] The facile explanation of all this expansion on the theory that it was due to the efforts of the crown to pack parliaments will not bear examination. The Cornish boroughs, which are usually chosen to substantiate this hypothesis, were in reality notorious for the independent and even fractious spirit exhibited by their representatives and for the paucity of privy councillors among their ranks.[3]

[1] D'Ewes, *Journals*, p. 396. [2] See below, p. 324.

[3] At least four pronounced protestants sat for Cornish constituencies in the first parliament of Mary's reign; Peter and Paul Wentworth and James Dalton were elected by Cornish constituencies in Elizabeth's reign; and under James I and Charles I nearly all the leaders of the parliamentary opposition found seats at one time or other in Cornwall, including Sir John Eliot, Hampden, Coke, Sir E. Sandys, Holles, Hakewill, Sir R. Phelips, Sir Henry Marten, and John Rolle. Hallam's theory (*Const. Hist.*, i. 45) that these Cornish constituencies were created to foster the influence of the court over the commons is not corroborated by the evidence.

It is more reasonable to suppose that the house of commons was reflecting the general growth of national sentiment and of the popular desire for a voice in its own affairs. People who repudiated absolute authority in the church would not remain submissive to political autocracy.

There were, of course, defects enough in the sixteenth-century representative system from the modern point of view. The lower classes had small means of asserting what little political will they possessed; and the greater the influence which the house of commons acquired, the greater the eagerness of landlords and aspiring lawyers to manipulate its elections. The social status of burgesses rose with the prestige of the house, aristocrats canvassed for seats which medieval craftsmen had sought to avoid, and in the eighteenth century both houses of parliament were appanages of the highest class of society. But the electorate was never reduced to the same uniformity: the representative system consisted of sections or samples; but the sections were vertical, not horizontal, and the samples came from various social strata. The county voters had to be freeholders, and the restriction was arbitrary enough, but it included in the franchise many who were poor and excluded many who were rich. The forty shillings, which had been a serious property disqualification in the reign of Edward I, was a trifling sum in that of George III, and many of the forty-shilling freeholders must have been very poor men. Again, the franchise in many boroughs was democratic, more democratic before than after 1832; and while the great reform bill mitigated many abuses and swept away some anomalies, it disfranchised numbers of poor electors, and created a grievance which fostered the Chartist movement.

Feudal traditions, however, long clung to our franchise law, and with them the theory that it was the land, and not men which should be represented in parliament. The "stake in the country," which was used in the eighteenth century to defend the monopoly of political power by the landed aristocracy against the claims of mere wealth derived from banking or commerce, was employed in the nineteenth

against the claims of intelligent poverty; and some contended that the number of a man's votes should be proportionate to his possessions.[1] Even now mere wealth does not entitle a man to a vote at all unless that wealth is converted into terms of the tenure or occupancy of land and what stands thereon. Mere intelligence does not count at all in our franchise laws except in so far as it accounts for university representation. Vast inroads have, however, been made on feudal theory by ideas of universal suffrage, and the real issue with regard to representation is whether the individual or the family is the unit to be represented. Modern socialism tends to make the state the sole form of society and to weaken every other bond of association; and parliament, instead of representing communities or families, is coming to represent nothing but individuals.

[1] These views were almost entirely abandoned in the debates on the Franchise Act of 1917.

CHAPTER IX

PARLIAMENT AND LIBERTY

It has been remarked by a skilled American observer of English politics that "private property in England is, on the whole, less secure from attack on the part of the Government to-day than it was at the time of the Stuarts."[1] A similar substratum of truth would underlie the statement that there was greater liberty before the beginning of parliaments than there has been since or is likely to be again; and the days when a wealthy magnate like Peter des Roches could evade a tax by voting against it must seem to many a golden age of liberty and property, from which England has been steadily falling away ever since parliaments were invented to rob the individual of his liberty by means of other men's votes. There is, however, no end to the paradoxes for which liberty has been the excuse or the justification. The crimes perpetrated in its name have been as multifarious as the sins committed on behalf of religion or the battles fought for the sake of peace.

It is the penalty of general and inspiring conceptions that they mean so many different things and inspire different minds in so many different ways. "When I mention religion," said the frank but reverend Mr. Thwackum, "I mean the Christian religion; and not only the Christian religion, but the Protestant religion; and not only the Protestant religion, but the Church of England."[2] Orthodoxy is my 'doxy; heterodoxy is other people's. True liberty is my liberty; other people's is their presumption. Servants take liberties, but are not often, in the minds of

[1] A. Laurence Lowell, *Essays on Government*, pp. 81, 82.
[2] Fielding, "Tom Jones" in *Works*, ed. 1859, p. 26.

their masters or their mistresses, entitled to what they take. "Like every other struggle for liberty," writes Bishop Stubbs of the Great Civil War, "it ended in being a struggle for supremacy." [1] Charles I fought for liberty no less than did the parliament or the army, the English, the Irish, or the Scots. Both north and south fought for liberty in the American civil war, the north for the liberty of the negroes in the south, the south for liberty to manage its own affairs. Masters and men are fighting all over the world for liberty, masters for liberty to employ their capital as they think fit, men for liberty to choose their own conditions of labour. Like charity, liberty covers a multitude of sins.

Nothing has proved more elusive than liberty, and its endless pursuit has filled the pages of English history. Men thought, and still think, it was achieved by Magna Carta; but it had to be fought for again in the fourteenth century, in the Great Civil War, and at the Revolution of 1688. Glorious as it seemed to the Whigs, even that vindication of liberty failed to satisfy men for long; reform bills in the nineteenth century were one after another hailed as heralds of a newer freedom; and even after the parliament act of 1911 liberty seems to some of us farther off than ever. Nor are we singular in our discontents. The thirteen American colonies fought a war of independence to achieve their liberty; they won, but three-quarters of a century later they were still fighting a sterner civil war for liberty; and the latest generation of freeborn Americans carried into office and power in 1912 a president whose banner bore the strange device "the new freedom." Man, said Rousseau, is born free, and everywhere he is in chains; man, it would rather seem, is born a slave and ever he is seeking to burst his bonds.

The fallacy lies in "man"; it also lies in "liberty." To say that man has achieved liberty is an inaccurate way of stating that some men have achieved some liberty. The problem of liberty, like that of property, is one of distribution, and cannot be divorced from that of equality. There was sense and logic in the union of the trinity of the French Revolution:

[1] *Constitutional History*, iii. 637.

there can be no liberty without some equality. But the third of the trio, fraternity, supplies—at least to an American student—the best illustration of the difficulty we have to face in tracing the growth of liberty. Every American undergraduate knows what a fraternity is; to an English undergraduate it looks like an embryo college. It is a voluntary association of students for social—some think for anti-social—purposes. Like every association, its value consists quite as much in the many undesirable persons it excludes as in the select few it comprehends. Fraternities are, indeed, too select for ultra-democratic feeling in the United States, and in more than one legislature bills have been introduced to abolish them as contraventions of democratic principle. Now, if a measure were passed by congress guaranteeing to all fraternities in perpetuity their privileges and their property, it is easily conceivable that such a measure might come to be called the great charter of fraternities. But it is not less easy to understand that the excluded majority might fail to discern any connexion between such a measure and the democratic ideal of fraternity.

That is the position of Magna Carta. It is the great charter of liberties, but not of liberty, and few habits are more fatal to historical understanding than that of assuming that the same word has the same meaning at different periods. We have no constants in history. It is far safer to assume discrepancy than identity, and it is an elementary precaution to warn beginners in history that medieval Germany might include Austria but not Prussia, Cambrai but not Breslau. These changes in the territorial meaning of familiar terms are comparatively simple and obvious; the vicissitudes in the terminology of ideas are more subtle, and even eminent archivists have provided striking illustrations of the dangers of ignoring them. Sir T. Duffus Hardy assumed that *religio* in the thirteenth century meant religion, and was astonished at John's modernism when he discovered a royal licence *condere novam religionem*, although John was guilty of nothing worse than granting a baron leave to found a religious house by alienating certain lands into mortmain.

Yet the difference between *religio* and religion was not greater than that between *libertas* and liberty; and John was as medievally-minded when he granted Magna Carta as when he licensed a baron to found an abbey.

The medieval *libertas* and *religio* have this in common to distinguish them from their modern synonyms. Both were concrete and material; both are now abstract and ideal. The transformation from the one to the other has been the common characteristic of linguistic development. The expansion of a nation's mind is seen, like that of a child's, in the expansion of the meaning attached to the terms it uses. One child has been known to think that Eleanor of Aquitaine was corpulent because she was described in a textbook as "one of Henry II's stoutest adherents"; and another imbibed the same idea of God from being told of His omnipresence. Liberty and religion are very local to primitive minds: local gods become tribal deities, and then the national gods of chosen peoples. But even Israel revolted against a God which had to be worshipped in Judah, as England murmured against a pope in Avignon, and nations had to advance far on the path of civilization before they relinquished their conviction that their God spoke in their vernacular and gave them special protection in battle.

Their liberties were as their deities, peculiar to themselves, circumscribed in their operation, bound to the soil, tangible, visible, and concrete. The *genius loci* was at the bottom of both; and famous shrines had their counterpart in great liberties. The general idea was lost in the local manifestation; and our Lady of Walsingham belongs to the same class of phenomena as the "liberties of the Fleet." Liberties were always attached to particular persons or places; there was nothing general or national about them. They were definite concrete privileges, which some people enjoyed, but most did not. The first clause of Magna Carta—*quod ecclesia anglicana libera sit*—seems to be general enough; but the explanation that follows shows that all it meant was that cathedral chapters should be free to elect their

bishops, and presumably that the king should not be free to refuse them their temporalities.[1] Possibly the explanation was a royalist gloss, and the demand for ecclesiastical freedom meant, in the minds of those who made it, that the restrictions imposed on the liberties of the church by the Constitutions of Clarendon should be ignored: as a matter of practice they were ignored in the later middle ages, and this was assuredly a more general liberty than any conceded in the charter. For the rest, the liberties of the *ecclesia* were simply the sum of the particular liberties of each ecclesiastic. They were rights of patronage and jurisdiction; and contention over these "liberties" of the church is quite as rife in the middle ages among churchmen themselves as between church and state. In both spheres alike liberty was an adjunct, almost a form, of property; and it was prized for its material and financial attributes.

It was almost always a local monopoly. The liberty of a town consisted largely in its right to rate its inhabitants and to levy tolls on all who frequented its markets. The liberty of a baron consisted in his authority over others, in the court he owned, and in the perquisites of his jurisdiction. To deprive him of this jurisdiction over his villeins was an infringement of his liberty expressly prohibited by the thirty-fourth clause of the charter. Another infringement of liberty forbidden by the charter was the reduction of the number of villeins on the estates of a ward of the crown. That was a "waste of men" which impaired the value of the lands, and the emancipation of his villeins infringed the liberty of the lord. Just as one man's food is another man's poison, one man's liberty was another's servitude. The liberties which the barons hoped to secure at Runnymede were largely composed of the services of their villeins. A liberty was in no sense a common right or a popular conception. It has been defined as a portion of sovereign authority

[1] There is nothing in Magna Carta to compel the king to invest an elected bishop with his temporalities, and the impossibility of binding the king in this way rendered the concession almost nugatory from the first.

in the hands of a subject; and the popularity of liberty entirely depends upon the extent of the portions and of their distribution. Medieval liberties were large, but their recipients were few. They were the exceptions to the rule; it was because they were rare privileges and not common rights that the framers of Magna Carta set so much store upon liberties. When the house of commons began to deal with the subject in Edward III's reign, it had a different tale to tell; it begged the king, in 1348, to grant no more liberties in the future. Every franchise or liberty was so much land and so many people cut off from the common law, excluded from the beneficent operation of king's writs and royal justice, and subjected to the arbitrary will of the owner of the liberty.

To redistribute and equalize liberty has been one of the principal functions of parliament; and the petition of 1348 is the earliest indication of its grasp of the problem. But one of the greatest obstacles to reform is commonly the reformers' frame of mind; and the keenest opponents of other men's privileges are often the stoutest defenders of their own. Parliamentary concentration on the task of reducing liberties was impeded by the addiction of members to their own; and so long as constituencies were evading parliamentary representation in order to lessen their share in taxation and save the expense of members' wages, the house of commons could not be a very efficient instrument of reform. The local interest ever outweighed the common advantage during the middle ages; and parliaments, while they gave vent to complaints, failed to enforce a remedy. The Good parliament of 1376 was followed by a worthless successor, and the commons by themselves were hardly able to compel the adoption of a single reform throughout the middle ages. It was not they who checked Edward I, removed Edward II or Richard II, or disposed of Henry VI or Richard III. Changes of government were sometimes legalized in parliament, but they were made outside, by unparliamentary methods and forces; and these same forces which made and unmade kings were themselves the repositories of the "liberties" of which the

commons complained. Indeed, the more they made free with the royal prerogative and took liberties with the crown, the greater grew their own. "Get you lordship," wrote one of the Paston correspondents in 1450, "*quia ibi pendet tota lex et prophetæ.*"[1] Lordship and liberty were much the same thing, and the over-mighty subject grasped an ever-increasing share of sovereign power. As late as Elizabeth's reign it was said that the men of Northumberland would have no other prince than a Percy, and in Yorkshire the sheriff had little power against the bailiffs and stewards of the northern earls. The so-called constitutional experiment of the Lancastrians consisted in little more than giving rein to the local liberties of the magnates, who in the Wars of the Roses took the bit between their teeth.

The extent of the liberties claimed by these magnates is difficult to realize, but without some appreciation of it we cannot explain the Tudor autocracy or understand how that despotism coincided with a vast movement of national liberation. It was not merely that the over-mighty subject excluded royal writs from his franchise and defied the crown from his feudal castle. We now regard the armed forces of the nation as the armed forces of the crown, but then the crown controlled but a fraction of the military strength of England. Each magnate had his council of state, his council learned in the law, and his bands of armed retainers, with which he could do more or less as he liked. In a state trial of 1554 it was urged in defence of the Duke of Suffolk that there was nothing treasonable in a peer levying his forces and making proclamation that foreigners should quit the realm.[2] Technically the contention was sound, but the picture of peers raising forces and making proclamations on their own account in the middle of the Tudor period indicates the largeness of their liberties. In Elizabeth's reign even members of her council considered it not incompatible with their loyalty to carry on diplomatic correspondence of their own with foreign powers and to invoke foreign assistance in their struggles with their colleagues. The law

[1] *Paston Letters*, i. 156. [2] *Chron. Queen Jane*, Camden Soc., p. 60.

of treason, too, protected them as well as the crown; if an offence against the latter might be high treason, an offence against the former might be petty treason; and an act of Henry VII speaks of a man's master as being his sovereign.[1] The idea of a single all-embracing national sovereign was still in the making, and lords still regarded themselves as princes [2] enjoying sovereign liberties.

The destruction of these liberties was the great service rendered by the Tudors to the cause of English liberty. Parliament in the middle ages had failed to nationalize liberty; with the help of the crown that nationalization was achieved in the sixteenth century. Liberty was made more common by redistribution; the great liberties of the few were diminished, the meagre liberties of the mass increased; and dukes and serfs make a simultaneous disappearance from the England of William Shakespeare.[3] The liberation was achieved, like most acts of emancipation, by despotic means. Even the act emancipating British slaves was passed in 1834 by a parliament in which the slaveholders were not represented and over which they had no control; emancipation was imposed by the north on the south of the United States at the point of the bayonet; and it was an autocrat of all the Russias who emancipated the Russian serf. So it was the Tudor despots who emancipated England from its medieval "liberties." Henry VII restrained the liberty of maintenance and deprived the nobles of their hosts of armed retainers;[4] and by means of the Star chamber he checked their liberty of packing, bribing, and intimidating juries. Henry VIII, by an act of parlia-

[1] See below, p. 228.

[2] The modern restriction of *princeps* or prince to members of royal families is an illustration of the centralization of sovereignty. Cf. Shakespeare's *King John*, "Now these her princes are come home again."

[3] With the execution of Northumberland in 1553 and Suffolk in 1554, Norfolk became the only duke in England, and he was attainted in 1572; for more than half a century England was destitute of dukes. Similarly the marquisates were reduced to one—Winchester. With regard to serfs, Sir Thomas Smith declares that they were practically non-existent in his time, though some instances of manumission are found earlier in the century.

[4] See my *Reign of Henry VII*, ii. 65–77.

ment,[1] took many medieval "liberties" into his hands; he improved upon the petition presented by the commons in 1348, and not only refrained from granting liberties, to the hindrance of the common law and oppression of the common people, but revoked the grants that had been made. The Tudor prerogative courts, the councils of the North, of Wales, and so forth, gathered into their hands the liberties of the marcher lords, and reduced the realm to a common order.

Nor was it only lords whose liberties were restricted in the interests of national freedom. The franchises of corporations might be as fatal to general liberty as the privileges of peers. Bacon described gilds as "fraternities in evil," Sir John Mason thought corporations more hurtful to the realm than anything else; and in 1682 the citizens of London were declared liable to fine and imprisonment for "presuming to act as a corporation."[2] They, too, were possessed of portions of sovereign authority which they used to the common detriment. London tried to impoverish other English cities by forbidding its merchants to frequent their markets, and England presented a welter of conflicting and restricting municipal jurisdictions. The "freedom" which cities now confer on eminent politicians is a survival from times and conditions in which every Englishman was a foreigner outside his native town, with no liberties in any city but his own. Nor did he possess much liberty even there. Municipal independence was no guarantee of individual freedom; and in many a medieval city renowned for its fight against despots the individual's liberty was confined by a minute and meticulous regulation unknown to oriental tyranny. His every act was regulated for him from the

[1] 27 Henry VIII, c. 24; cf. 32 Henry VIII, c. 20. There are still survivals. The city of London is exempt from justices of assize. The Marquis of Exeter, as lord paramount, appoints all magistrates in the soke of Peterborough (*Vict. Hist. of Northamptonshire*, ii. 423–4, 427). Halifax had its own "gibbet-law," and there are still quaint "liberties" in Kent (McIlwain, p. 360).

[2] Leadam, *Star Chamber*, Selden Soc., vol. i. p. cli; Tytler, *Edward VI*, i. 362; *Foreign Calendar*, 1547–53, p. 90; Maitland, *Collected Papers*, iii 311.

cradle to the grave. He could not leave the parish in which he was born or the trade to which he was bred, or carry on business except in accordance with cast-iron rules. The necessities of self-defence in a limited space compelled the closest formation, and individual liberty was a luxury which municipal independence could not afford. National strength and protection relieved the need for congestion. City walls and castle-keeps could disappear with civil war and feudal anarchy, and civic liberty could spread to the bounds of the sea behind the shield of a nation's navy. It was not mere chance that the dynasty which created England's fleet destroyed its civic independence and subjected municipal legislation to national control.[1] By centralizing power the Tudors expanded English liberties and converted local privileges into a common national right.

They did it by means of parliament, and could not have done it without. For one thing, only the common feeling produced by the co-operation of local representatives at Westminster could have prepared the way for the requisite surrender of local prejudice and the merging of local in national liberty. For another, nothing less than an act of the crown in parliament could have constrained these local and personal liberties. It was sufficiently revolutionary that even an act of parliament should override a medieval liberty; for the notion of fundamental law was deeply ingrained in the medieval mind, and the possessors of liberties based their possession on a divine or natural law that was beyond and above the power of kings or parliaments. Magna Carta was long regarded as fundamental law, and repeated protests were made that all things done in contravention thereof, judicial or legislative, within or without parliament, should be regarded as null and void. The growth of positive law at the expense of divine and natural law, and of the idea that human will and mundane counsels could amend the foundations of society, is the beginning of the sovereignty of parliament. But without that overriding

[1] 19 Henry VII, c. 7; cf. Leadam, *Star Chamber*, vol. i. p. cli; and my *Reign of Henry VII*, vol. i. p. xliv, vol. ii. 198–9.

sovereignty to limit and abolish them, English medieval liberties would have petrified society on a mould of local and class particularism, and have produced that kind of ossification which stereotyped oriental communities and even reduced France to the necessity of bursting its social shell for the sake of expansion.[1]

As it was, the crown in parliament secured a free hand through the tacit or actual surrender of the claim to indefeasible liberty on the part of individuals and associations. The attachment of the medieval mind to this autonomy was pronounced, and it has been said that the indestructibility of the individual will was the strongest characteristic of the middle ages.[2] Even in the administration of justice the accused could refuse to submit to the verdict of his country; he could "stand mute," *i. e.* decline to plead. It is true that the one form of torture countenanced by English law, the *peine forte et dure*, could be applied to overcome this resistance; but if he died under its pressure, the court had to go without its verdict. He died an innocent man and his property could not be touched. When Henry VIII was attacking the monasteries infinite pains were taken to secure "surrenders" in preference, or at least as a preliminary, to parliamentary confiscation. In every sphere the particularist manifestation was strong compared with the national, and parliaments only succeeded in overriding the individual because every Englishman was "intended" to be present in parliament, and an act of parliament was understood to be by representation the act of every individual. Its sovereignty was the sum total of the will of every member of the community. It monopolized power and prepared the way for the Austinian dogma that law is the command of the state. Liberty therefore came to depend, not upon an immutable divine or natural law, but upon the will of the community as expressed in acts of parliament which

[1] Cf. the French declaration of 18 August, 1792: "A state that is truly free ought not to suffer within its bosom any corporation, not even such as, being dedicated to public instruction, have merited well of the country" (Maitland, *Coll. Papers*, iii. 311).

[2] Gierke, *Political Theories of the Middle Age*, ed. Maitland, pp. 81–2.

could extend, restrict, or redistribute the various liberties possessed by different classes.

The effect of this development of parliamentary power was to make it possible to moderate the inequalities of medieval liberty; and, while the overmighty subject suffered crushing blows in Tudor times, the age was for the mass of English people one of liberation. Liberty became a national matter rather than the privilege of a class or a locality. Curious relics of local liberties still remain; but for the most part these anomalies were, during the sixteenth century, merged in common and equal rights guaranteed by acts of parliament and enforced by royal or national law courts. It was the destruction of these barriers and the fusion of classes that produced the intense national and patriotic feeling of Elizabeth's reign. The trinity of estates fades into the unity of the state.

The state, however, and its organized expression in parliament were of composite character; and each of its elements struggled for supremacy. England had been unified under the ægis of the high court of parliament; there were to be no local sovereignties, no provincial parliaments, no autonomous church, and that "parliament cannot err" became a doctrine recognized even by royalist judges.[1] But within the precincts of this court, crown, lords, judges, and commons contended for the mastery, and asserted their "liberties" in a medieval spirit. James I and Charles I were just as intent upon "liberty" as the house of commons or chief justice Coke; and to each element in the constitution liberty meant its liberty, that is to say, its independence and irresponsibility. James had engraven in his heart a "law of free monarchy"[2] and he tried also to impress it on his people. By this freedom he meant independence alike of pope and parliament, and dependence only on God. Nor was James peculiar in this view; his most illustrious victim agreed. The prince, quotes Raleigh with approval, *non*

[1] *Letters and Papers of Henry VIII*, vol. xxi. pt. ii. p. 345; Gardiner, *Select Documents*, ed. 1889, p. 54.
[2] See *Political Works of James I*, Harvard Univ. Press, pp. 52 *sqq.*

subjicitur nisi sua voluntate libera, mero motu, et scientia certa; and any constraint absolved him from his bond.[1] Charles also contended that in defending the liberties of kings he was making common cause with his people. Government was nothing pertaining to them; it was his "liberty": theirs consisted in living under such laws as protected their lives and property, and not in controlling the government. He claimed that the free choice of advisers was a liberty possessed by every man, and that parliament, in attempting to make his ministers responsible to it, was robbing him of a liberty enjoyed by all his subjects.[2] Like true medievalists, the Stuarts based their claim upon a divine, immutable right; but they added a Reformation doctrine that this right was immune from papal arbitrament, and a further contention that it was based on primogeniture. That was the one kind of predestination which commended itself to James I; and his divine hereditary right of kings was a cross between scholastic politics and Calvinistic theology. With it parliaments had nothing to do: no positive law made by human hands could amend an ordinance of God.

Parliament's conception of liberty was hardly less self-centred. Liberty was its liberties. Whence they had been derived was of little concern to members, and their historical scholarship was worse than that of the Stuarts. But convictions that have no historical basis are often political assets. Parliament was convinced that its liberties were immemorial, that they were irrevocable rights independent of the grace or favour of the crown. Parliament was, it told James I in 1604, above the law;[3] it regarded itself as responsible neither to the crown nor to the people, and its privileges as being the expression of its own autocracy. Coke, on the other hand, was concerned with the liberties of the judges; according to him they were independent and irresponsible. They were the supreme interpreters of the

[1] Prothero, *Select Documents*, p. 409.
[2] Gardiner, *Select Documents*, pp. 157, 285–6.
[3] Prothero, *Select Documents*, p. 290.

common law, and the common law was to him what divine right was to the Stuarts and parliamentary privilege to the house of commons, something above the reach of amendment either by crown or by parliaments.[1] He looked upon it as perfect and fundamental, and upon the judges as the arbiters of the constitution, in much the same way as federalists regard their supreme courts. His view was a reversion to the thirteenth century, when Magna Carta was the constitution and *judicia* were the only form of legislative amendment. "Magna Carta," he said, "is such a fellow that he will have no sovereign"; [2] and he, as chief justice of common pleas, was its high priest. To him the autocracy of the bench was the highest kind of liberty. Nor did Cromwell differ radically from these conceptions, though he gave them a different turn. The army's title to rule was a divine right, proved by victories vouchsafed by the God of battles; and the supreme magistrate must have liberty to establish that form of religion in which he believes; otherwise he is denied his freedom of conscience.[3]

The constitutional struggle of the seventeenth century was an effort to deprive kings of their liberties, and it was consummated in the Revolution of 1688, which robbed the crown of liberty of conscience and imposed upon it a whole decalogue of prohibitions. Liberty was transferred from king to parliament, and parliament could authorize the king to commit every one of the acts which it declared illegal without its consent. While bounds were set on every side to the freedom of the crown, none were imposed on that of parliament; and for three-quarters of a century after the Revolution the house of commons asserted an independence and irresponsibility as great as that which the Stuarts had claimed for themselves. It interpreted its liberties as including powers to deny the right of petition to the crown, to

[1] The lawyers in parliament held similar views, and in 1604 the Speaker described the common law as a compound of the law of God, the law of reason, and the law of nature, and therefore as being immutable (*Commons' Journals*, i. 254*a*; McIlwain, p. 63 *n.*).

[2] *Ibid.*, p. 83.

[3] Carlyle, *Cromwell*, ed. Lomas, ii. 382.

refuse as a matter of privilege the right of electors to vote, to exclude members whom they had elected, and to admit candidates they had rejected. To report speeches delivered and to publish division lists taken in parliament was denounced as countenancing the mischievous idea that members were responsible to an authority outside the walls of the two houses; and their parliamentary liberties were even invoked to give an extra-legal protection to members' fishponds and rabbits.[1] Parliamentary privilege was, in fact, the last of medieval liberties to be reduced by common law. Nor is the medieval conception of liberty yet extinct; it survives in the independence sometimes rashly claimed for the house of lords. For independence is like liberty, a vague but stimulating word, and its value depends upon the sort of immunity it implies. Independence of the house of commons is at least a plausible claim to make for the house of lords. But one of its boldest members has contended that even though a measure were approved at a dozen general elections, the house of lords would be entitled to reject it. This is frankly independence of public opinion; it is the liberty of Magna Carta and the Stuarts, a liberty to the hindrance of the common law and oppression of the common people.

What then did the Whigs mean by that "civil and religious liberty" which they were never tired of toasting and thought they had won by the glorious revolution? Clearly it did not imply to them a universal franchise, a share of every man in the control of government. Not one Englishman in fifty possessed a vote in the eighteenth century; even the agitators of Cromwell's time scouted the notion that servingmen should vote, and for a hundred years and more after the revolution the Whigs as a whole opposed any extension of the franchise. Electors must be "free and independent," independent, that is to say, of masters and employers. The Whig conception of liberty was not very different from that of Charles I; government was not a matter pertaining to the people; for the vast majority liberty should consist in

[1] McIlwain, p. 376; this was only an extension of the privilege which protected members' servants from arrest.

freedom from molestation, the kind of liberty which every benevolent despot of the eighteenth century tried to bestow on his subjects. Liberty of conscience they conceded, and some liberty of speech and worship; but the Test acts still remained upon the statute-book, freedom of the press was still restricted, and that kind of liberty which implies a right to vote was ignored. It was not until 1917 admitted as an indispensable element of freedom; for the whole population was supposed to be free, while only one sex wielded the vote. Parliament in 1688 thought that liberty was achieved when the houses controlled the crown. Their liberties were no doubt secured; but the Whigs failed to realize that unless the nation secured control of parliament, parliamentary liberties might become as dangerous to the community as the baronial liberties of 1215 or the royal liberties of the Stuarts.

This failure was largely responsible for the American war of independence; but the authors of that revolution no more succeeded in solving the problem of liberty than did the Whigs in 1688. Indeed, they provided perhaps the most striking example in history of the facility with which men can be blind to any liberties but their own; and there are few more ironic spectacles than that of a community consisting largely of slave-owners proclaiming in fervid tones their devotion to the rights of man. When they spoke of man they meant white, and not yellow, red, or black men; and their gospel of universal liberty was only intended for application to themselves. But, even apart from the races more highly coloured than the colonists themselves, the assertions of liberty in which American constitutions abound have left a good deal to be desired by the descendants of those who framed them; and latter-day citizens of the United States have discovered that the mere assertion of the principle of liberty is a poor substitute for its definition. No one, runs the most famous of the commonplaces of American constitutions, shall be deprived of his liberty without due process of law; and the interpretation thereof has been left to the supreme courts of the various states. A few samples will suffice for illustration. A state legislature

passed a measure prohibiting employers from paying wages in kind instead of coin; its supreme court declared the law invalid because it infringed the employer's liberty without due process of law. Similar measures to compel the provision of washhouses for miners and to prevent the use of the stars and stripes for commercial advertisement have been pronounced invalid in the sacred cause of liberty. That a man may do what he likes with his own was for long one of the cardinal principles of American sociology, even when "his own" included his human chattels. Liberty was linked with property and became the liberty of property, the servitude of men.

From these judicial extravagances England has been saved by the historical fact that parliament is the highest court in the land. Every act of parliament is due process of law, and no inferior court can declare it invalid, while in the United States no legislature is a court, no legislative act is due process of law, and a supreme court can often frustrate the legislature of the state. But the problem of liberty remains unsolved. At the revolution of 1688 men imagined that all was gained with the achievement of civil and religious liberty; in the nineteenth century they pinned their faith to political liberty and looked for the advent of the millennium with the vote. In the twentieth we are still seeking for a new freedom, for a fresh liberty, which some would call moral and some economic. What is liberty without a living? "We know," declared the Levellers more than two and a half centuries ago, "that England cannot be a free commonwealth unless all the poor commons have a free use and benefit of the land." [1] "So you stand upon natural right," Ireton had retorted to Rainsborough in one of the great army debates of 1647, "then show me the difference between the right to a vote and the right to subsistence." [2] Ireton's purpose had been to explode the right to a vote; but the justice of political liberty once conceded, it is hard to defend the justice of economic dependence.

[1] G. M. Trevelyan, *England under the Stuarts*, p. 283 *n*.
[2] Morley, *Cromwell*, p. 231.

The ceaseless struggle for liberty has therefore taken at last an economic turn. The liberties of Magna Carta implied the servitude of villeins; the enfranchisement of villeins portends the "servile state." For the liberties of masters we have the liberties of men, and for the subordination of the many the restriction of the few. The rise of democracy, like every other struggle for liberty, ended by becoming a struggle for supremacy. But it did not solve the problem of liberty. Even the democrats feel that freedom is not identical with the rule of the majority; and syndicalism is a reversion to medieval liberty, in that it is an attempt to substitute group-control for state-control, a sort of democratic feudalism, a compromise with anarchy, and a counterpart of the capitalistic feudalism of the trusts. But the restoration of particularism would mean anarchy, and anarchy is more fatal to common liberty than any form of polity, because it leaves the common man at the mercy of his unscrupulous or over-mighty neighbour. Sovereignty is the only bulwark against civil war, the only arbiter of rival claims, and the only guarantee of peaceful liberty; and sovereignty can only be the national will expressed in parliament. Parliament alone can expand and redistribute economic liberty, as it has expanded and converted the private liberties of the middle ages into the common rights of modern times. Its arbitrament is indispensable, for otherwise struggles for liberty will be chronic, barbarous, and inconclusive. The individual cannot be isolated in the state; his liberty is always a matter of relationship to others; and the greater the liberty of any particular man, the less is the liberty of his fellows. Struggles for liberty always end in struggles for supremacy, because liberty depends upon control. My liberty consists in the restraint imposed upon the actions of other men; it is worth nothing if they are free to do what they like, and theirs is a phantom if mine is absolute. Liberty uncontrolled is the licence of tyranny, and the alpha and omega of common liberty is the common restraint of the individual.

There is only one solution of the problem of liberty, and

it lies in equality. Without some equality there can be no common liberty; and the equalization of liberty has been one of the greatest achievements of parliament. There are, indeed, endless kinds of equality, some of them idle dreams, some pernicious, others desirable, and some accomplished. Abstract or mathematical equality has no value amid the infinite and inevitable inequalities of human conditions; and the most fervent apostles of human equalities do not hope to go further in the promotion of equality in physique than giving every child an equal chance of healthy development. But more has been done than that with regard to the results or implications of physical inequality. Men vary in physical strength; but so far as their social relations go that inequality has been abolished. The weak are as safe as the strong in civilized communities, and the strong are effectually prevented from using their strength to the detriment of their weaker neighbours. Yet there must have been a period in social evolution when this refusal to permit the strong man to do what he liked with his own physical strength seemed, at least to the strong, an outrageous interference with personal liberty. Of what use was his strength unless he could use it as his taste or conscience suggested? There is, in fact, no more reason why a man should be allowed to use his wealth or his brain than his physical strength as he likes; and the principle which controls the one should also control the other. No one hopes to equalize physical strength; no sane person expects to equalize wealth or mental equipment. But liberty in the employment of each should be restrained by the same social considerations. The liberty of the weak depends upon the restraint of the strong, that of the poor upon the restraint of the rich, and that of the simpler-minded upon the restraint of the sharper. Every man should have this liberty and no more, to do unto others as he would that they should do unto him; upon that common foundation rest liberty, equality, and morality.

That is the golden rule for the liberties of the subject. Others, it is true, must possess more extended powers. A

police constable and a prime minister must have wider liberties than the private citizen; but these are matters, not of right, but of obligation, service, and responsibility. Their liberties are their duties, imposed upon them by the community; and the greater the liberty, the more exacting the obligation. Freedom is grounded in service: as of old in England a man was a voter because he served on a jury, so to-day a man wields power because he is a minister. We have princes and governors galore, but their ministers are their masters, because they are responsible. It has been the supreme good fortune of England that her constitutional history and her liberties started from service and duty, and not from the rights of man. These were the natural product of an impious generation which ignored man's obligations, and looked upon him as an anarchist to be judged by the liberties he seized and not by the services he rendered. "They made and recorded," said Burke, "a sort of institute and digest of anarchy called the 'Rights of Man.'" [1]

Absolute rights are, indeed, fatal to society, and it would be easy to strangle a community with liberty and property. One of the causes, said Hobbes, which tend to the dissolution of a commonwealth, is the idea that the subject possesses such a right of property as excludes the sovereign. No taxation could be raised if the individual had an absolute right to all his property, and no railway could have been constructed without acts of parliament overriding the liberty of landlords to do what they liked with their own. But if property has its liabilities and its limitations for the sake of the common good, so too has labour. If, for instance, the interest of the consumer is a valid objection to a protective tariff, it can also be pleaded against a minimum wage. If the interest of the community is the supreme consideration, it must be superior to the liberty of any section; and any differentiation must be based, not on the absolute

[1] Speech on Army Estimates, 1790, in *Works*, ed. 1834, i. 378; Boston ed. 1865–7, iii. 221. Burke referred to the French, and not to the American "Rights of Man."

right of any class, but on the value which concessions to a particular class may have for the community as a whole.

The only criterion of such issues is the common sense and conscience of the community expressed by means of parliament. On that all liberty must depend. It is thought by many that such decisions, which are fundamentally questions of morals, should rest with the church, and not with the state. But churches are many, and they do not always agree. Judgement by churches would be judgement by groups, with no final arbiter in case of divergence; and divergence without a supreme tribunal involves an ultimate appeal to the barbarous arbitrament of social, political, or economic warfare. To some institution representing the whole community we must therefore have recourse; and in its service we must seek our liberty. Medieval liberty was a monopoly, an irresponsible trust; modern liberty should be a trust for the community; and given that equal condition, there need be no equality in the powers entrusted. Much is required from him to whom much is confided. There need be no servitude in that service and no servility in that state. Obedience to a tyrant is slavery, but the service of mankind is liberty. The proudest of the titles of the pope is *servus servorum Dei*, and the highest ambition of an Englishman is to be prime minister, the chief servant of the people. The nearer we get to a perfect master, the nearer does our service approach to perfect freedom.

CHAPTER X

PARLIAMENT AND THE CHURCH

THE progressive interference of parliament with medieval liberties inevitably involved a conflict with the church, for the Church in England was the greatest and most august embodiment of medieval liberties, and the first clause of Magna Carta guaranteed that the *ecclesia anglicana* should be free. To that clause the great charter owes not a little of the admiration it excites in modern times. It is a clause which appeals with equal force to the catholic and to the free churchman; and no principle commands more general acceptation than that which is read by different schools of thought into the opening words of John's surrender. It is, however, a singular fact that the liberty thus guaranteed to the church, and explained in the following clause to be freedom of election, is a liberty of which the church was effectually deprived four centuries ago. It is true that under the Reformation settlement the crown issues a *congé d'élire* whenever an episcopal vacancy has to be filled, and that the chapter concerned meets and elects its head. But the *congé d'élire* is speedily followed by *letters missive* in which the crown designates the person to be elected; failure to comply involves liability to the penalties of *præmunire*, that is, total forfeiture of goods and imprisonment for life; and the fact that no chapter has ever braved these penalties by neglecting to elect the crown's nominee must be accepted as proof that the church has been, and is, content to forgo the liberty granted by Magna Carta. These matters were settled by statute in the sixteenth century, and the instrumentality of parliament in the suppression of

ecclesiastical freedom harmonizes with its general attitude towards medieval liberties. But before discussing the relations between parliament and the church, it is well to attempt some definition of our terms.

The church has many meanings; indeed, it might almost be said that the long story of theological controversy turns mainly on its interpretation. Apart from the church invisible, the church visible may mean the whole church of God or any particular branch thereof to which the speaker belongs; every churchman, free or other, will limit the church by his definition of the faith; and the more numerous the articles of his faith the smaller will be the number of the faithful. The medieval catholic was less perplexed about his frontiers; there was but one church and one great schism. The Greek and the Roman communities belonged to one catholic church, though each regarded the other as schismatic. But, while more comprehensive in this respect, the medieval church was more circumscribed in another. No layman could be a churchman; the *ecclesia* was composed of ecclesiastics. The distinction survives in popular parlance, and "to enter the church" is the vernacular for taking holy orders and becoming an ecclesiastic. Modern confusions, no doubt, have crept in; "churchman" is used with a somewhat offensive implication to distinguish Anglican laity and clergy alike from nonconformists and from Roman catholics, and on theological grounds it is held that one "enters the church" at baptism. But this is not the language of medieval times. When parliament or the council speak, as they often do, of *tous estats de sainte église*, they do not include a single layman; and even as late as the seventeenth century, when Bacon describes Henry VII's countenance as being "reverend and a little like that of a churchman," he is not contrasting it with that of a nonconformist or that of an unbaptized infant.[1]

The point is of some importance, because no understanding is possible of the relations between church and state without clear conceptions upon it, and the confusion between modern

[1] Bacon, *Henry VII*, ed. 1870, p. 402.

and medieval ideas is widespread and persistent. It has, for instance, been recently remarked, in an attack upon Maitland's views of canon law, that the statutes of provisors and præmunire were passed "by representative bodies of Anglican churchmen."[1] But "churchmen" could only be translated into medieval Latin as *viri ecclesiastici*; and the only ecclesiastics present in parliament protested unanimously and vigorously against the passing of these acts. There was the clearest and sharpest antithesis between lay and clerical authority, between courts that were royal and those that were christian, between *regnum* and *sacerdotium*. *Regnum terrenum*, declared a medieval publicist, *est malum et diabolicum et opponitur regno cœlesti*.[2] There was nothing in common, wrote Queen Mary to Cardinal Pole, between the body politic and the body ecclesiastical.[3] The famous altar-piece at Mansfield, which produced so profound an impression on the youthful Luther, represented the church as a ship in which alone lay salvation from the waters of destruction; no layman was in the ship, no churchman in the water. The state appeared, at least at times, to Hildebrand and his pontifical successors as the work if not the sphere of the devil.

This, no doubt, was the extreme papalist view, in which few English prelates concurred. For after all the state, in England at least, was largely the work of their hands and the sphere of their activities. They sat in parliament, almost monopolized chancery, and were often predominant in the king's council. The wordy warfare, in which papalists and imperialists developed a whole literature of analogies and abuse, appealed to metaphysical Germans and perfervid Italians rather than to stolid Englishmen, who had not the same personal or patriotic concern in the struggle

[1] Ogle, *Canon Law*, 1912, p. 106, although Mr. Ogle himself has just (p. 103) distinguished between the medieval meaning of "churchmen" and the "fuller modern sense which includes the laity." On p. 60 he also identifies the "prelatz et autres gentz de seinte eglise" with the royal and baronial patrons (*Rot. Parl.*, ii. 233). Churchmen are defined in the *Rot. Parl.* for 1376 (ii. 336) as prelates and "hommes de Sainte Eglise, c'est assavoir, chanons, prebenders, et persons."

[2] Maitland's *Gierke*, p. 110.

[3] *Poli Epistolæ*, pt. iv. p. 119.

between a German *regnum* and an Italian *sacerdotium*. The investiture controversy was feebly reflected in England, where, except for occasional outbursts from Beckets and Winchelseys, churchmen and laymen worked well together under a common and temporal sovereign; and the comparative feebleness of the roots which the papacy struck in English soil helps to explain the ease and completeness with which they were torn up by the Tudors. It was seldom that an English prelate went so far as archbishop Winchelsey when he asserted that English ecclesiastics owed a twofold allegiance to the pope and the king, and that their allegiance to the pope took precedence of their allegiance to the king. The medieval contest in England was not so much a foreign war between English monarchy and the papacy as a domestic struggle between lay and ecclesiastical jurisdictions. Sometimes a powerful pope took over the lead of the clerical forces, but more often it was an insular combat of barons and bishops, royal prohibitions and episcopal injunctions, and papal intervention was not always welcome to those on whose side the papacy intervened.

The papal yoke lay light upon the conscience of the average English prelate, perhaps because it bore so heavily on his pocket; and the oaths of fealty exacted by the Roman pontiff were probably taken with mental reservations over and above the express reservation contained in the oath he swore to the king. He was ever a baron as well as a bishop, and his barony was a bond with the crown not easily ignored. Moreover, a bishop had frequently from his youth up been nurtured in the service of the crown. Rome was a distant place to the medieval Englishman; only one attained the papal chair,[1] and he had been a stranger to England from his youth. English cardinals were few and far between. The papacy was in every sense a foreign government, for which there was little, if any, enthusiasm among the ranks even of English churchmen. Maitland's jest about Anglo-Catholics, who believe that the English church was protestant before the Reformation and has been

[1] Nicholas Breakspear, who was Pope as Adrian IV from 1154 to 1159.

catholic ever since, was perhaps deserved; but it is quite probable that there have been more sincere adherents of the papacy in England since the breach with Rome than there were before it. The dogma of papal supremacy was academic and disputable in orthodox circles till the close of the middle ages. Œcumenical councils deposed popes one after another; and the Pilgrims of Grace had little to say for the pontiff. He was not an integral part of the catholic faith, and there were other supports than the papacy for the catholicism of medieval England. But after the breach, and still more after the Edwardine Reformation, the papacy seemed the only bulwark of the catholic church; catholicism became bound up with Rome, and most catholics dedicated to the pope their loyalty to the faith. There was a new and a stronger bond between Rome and English catholics than had existed in the middle ages.

But this old English indifference to the papacy did not imply the independence of the English church. During the later middle ages English churchmen were devoted to a catholicism which they did not identify with the papacy, but they feared and detested the approaches of nationalism. The arguments for English ecclesiastical independence generally fall very wide of the mark. Nothing, for instance, could be more misleading than the contention that Henry VIII did no more than William I had done when he claimed to determine which pope should be recognized in his dominions. Henry eradicated the jurisdiction altogether: William merely asserted a voice in the determination who should wield it. He no more thought of abolishing papal jurisdiction than the Whigs thought of establishing a republic when they substituted William III for James II. Nor would the argument, if sound, establish the independence of the English church; it would merely establish her dependence on the English monarchy.

A more serious source of error is confusion of chronology. It will not do to build fourteenth-century independence on arguments from the Anglo-Saxon period. The middle ages were, like other times, a period of change; and what is

true of one century is false of another. Provincial independence was obviously greater before the catholic church had been organized by Hildebrand and his successors. Cranmer selected the pontificate of Nicholas II (1058–61) as the epoch at which the church became corrupt, or, in other words, the epoch at which archbishop Stigand was condemned by papal legates and provincial independence was submerged in catholic organization. It might be safer to put the matter in Stubbs's fashion, and say that in England the time had come for Lanfranc and Anselm as well as for William of Normandy and Henry of Anjou. The point is that Lanfranc and Anselm were not English; they represented the ecclesiastical aspect of the Norman Conquest and the submergence of English insularity beneath the waves of continental culture. From that time for two centuries there was even less English independence in the church than in the state. The law and the language, the ritual and the organization of the church, all came from abroad; the episcopate was almost closed to natives; and there was nothing national in the inspiration of the monks and friars. To the end of the thirteenth century England was catholic to the core. Our concern here is with the two and a half succeeding centuries, during which England emerged from these catholic conditions and parliaments assisted in developing the nationalism which involved a gradual differentiation and then independence of type. The history of the constitutional relations between parliament and the church turns mainly on the friction between a secular body, growing more and more national, and an ecclesiastical body clinging more and more closely to the international system on which it was based and from which it derived its support.

The antagonism was fundamental, although it only developed with the growth of the English national state; for in England the church was Latin, but the state Teutonic. In Latin communities the conflict was less pronounced and the Reformation made little way, for there both state and church were based upon identical Roman principles; empire and papacy, said Zwingli, both came from Rome. Both

claimed a divine and not a popular sanction.[1] In Teutonic states, on the other hand, the ruler's commission came from below, not from above; and the form at least of popular election survived the attempts of the church to base secular monarchy also on a divine right conveyed and interpreted by herself. For a time, indeed, during the halcyon days of the papacy, the Latin ecclesiastical view obscured the secular and Teutonic, and in France it achieved a lasting victory. But in England the growth of representation, which enveloped the central government, withdrew it further and further from the domain of Latin ideas. A divergence set in which led to conflicts of jurisdiction and finally ended with the submission of the clergy to Henry VIII.

This divergence permeated both organisms. The papacy, that ghost of the empire sitting enthroned in the midst of the ruins thereof, inherited the spirit and carried on the traditions of Cæsar. Its law was the law of Rome; its principle was unlimited monarchy; its divisions were Roman provinces, carefully drawn to divide and undermine national sentiment. It trusted to revelation and not to representation. Its legislation consisted of papal bulls and not of the acts of an assembly; its courts required no juries, for a system claiming infallibility could hardly invoke the aid of common intelligence. Its taxes were not voted, but imposed. The clergy in England granted their aids, their tenths, and their subsidies to the king; they granted none to the pope, because he took them without their leave. First-fruits and tenths were not voted in convocations; they were levied by papal command; and the "taxatio" under which the clergy groaned was named after the pope or the papal collectors.[2] The pope was God's vicegerent; he had no need of consent. Harmony, no doubt, was always desired between the Vicar of Christ and his flock, but harmony must

[1] Both emperor and pope were, indeed, elected, but one by seven princes and the other by cardinals.

[2] *E. g.* the "taxatio Norvicensis" of Walter Suffield, Bishop of Norwich and papal collector in 1253, and the "taxatio" of Pope Nicholas IV in 1291. Cf. Wilkins, *Concilia*, iii. 646, "Alexander VI papa . . . imposuit clero Anglicano subsidium unius integrae decimae."

be secured through the obedience of the sheep and not through the shepherd's concessions. A theocracy could not parley with popular pretensions.

The Teutonic state was more a matter of compromise. Royal elections involved electoral promises, and Norman kings themselves began their reigns with charters to their people. Even before parliaments were created, royal acts of legislation were constitutions rather than institutes, measures set up by agreement and consultation, and not imposed by sole authority. Kings levied, indeed, their rents or feudal services, but other aids and scutages had to be given them by their subjects; and Edward I's maxim, *quod omnes tangit ab omnibus approbetur*, was the antithesis of the principle of papal sovereignty. With the growth of parliament the necessity for consent grew ever more insistent, and with it widened the breach between the foundations of church and state. Edward I attempted a union by summoning churchmen and laymen alike to the high court of parliament; but the reigns of his son and his grandson witnessed the failure of the experiment, and in course of time the side which rejected the union for the sake of independence fell into a state of subjection.

The conflict of ideals developed a practical conflict of jurisdictions. It was not a simple matter of warfare between two organisms, each with its own code of laws; for both were subject to both jurisdictions. Churchmen were under the law of the land as well as under that of the church; laymen were subject to canon as well as to civil law. It was strife between two kinds of allegiance, in which every man was divided against himself; he had two sovereign lords, the pope and the king, and while the clergy inclined to the pope, the laymen preferred the king. Each, however, made his choice at no little risk to himself; and the dilemma, in which the soldier may find himself placed to-day, between the risk of court martial if he refuses when ordered to fire upon a mob, and the risk of trial for murder if he obeys, is a rare inconvenience compared with the distraction of the medieval Englishman between the courts christian and the

courts of his king. He might be outlawed if he obeyed the church and excommunicated if he obeyed the king. He might be treated as a bastard by royal judges and as legitimate by the authorities of the church; for the famous refusal of the barons in 1236 to assimilate the laws of England to those of the church and to recognize legitimation by the subsequent marriage of parents, had no effect upon ecclesiastical jurisdiction, and down to the Reformation the ecclesiastical courts administered one law of legitimacy and the secular courts another.[1] He might be granted probate by one court and be refused possession by another; for in the fourteenth century the church was encouraging villeins and women to make wills, which the commons complained in parliament was contrary to reason.[2]

Friction between the two jurisdictions was incessant, because their frontiers were disputed, and there was no supreme court to settle the issue; the two supreme authorities were the parties to the suit. Henry II attempted a settlement by the Constitutions of Clarendon, and Edward I another by his writ of *circumspecte agatis*. There were few acres in the whole field of secular jurisdiction which might not be invaded by clerical courts. Everything to do with marriage, the making and administration of wills, and the faith was left as a matter of course to the clergy, though an attempt to include debt among matters of faith provoked a clause in the Constitutions of Clarendon. If a debt was confirmed by an oath, it brought the debtor within the sphere of ecclesiastical jurisdiction; for the oath was *interposita fides*, it established a direct relation between God and the debtor, and of those relations the church was the only arbiter.[3] These were questions which drew the laity into the clerical courts; still greater efforts were made to keep the clergy out of the clutches of the secular law, and

[1] Maitland, *Canon Law*, pp. 53–4; Makower, *Const. Hist.*, pp. 422–3; *Rot. Parl.*, ii. 153, 171; *Letters and Papers of Henry VIII*, vii. 1385.
[2] *Rot. Parl.*, ii. 148–51.
[3] The attempts to draw debts and other secular contracts into the courts christian were the subject of perpetual complaint in parliament; cf. Maitland, *Memoranda*, p. 305; *Rot. Parl.*, i. 219, 293, ii. 142.

the most resounding blows in the conflict between the two jurisdictions were struck over the *corpus vile* of the criminous clerk. Maitland has illumined the legal intention of Henry II's proposals without attempting an estimate of their results. But it seems clear that victory rested with the church: judgement, indeed, appears to have gone to the secular court, but execution remained in the tender hands of ecclesiastical authority which was precluded from shedding blood. In 1351, in answer to a petition of the clergy, Edward III maintained his jurisdiction over churchmen so far as high treason was concerned, but admitted benefit of clergy for murder and other crimes on condition that the church inflicted perpetual penance and prison—a condition that was kept with exceeding laxity.[1] Benefit of clergy continued to shield the clerical criminal to the end of the middle ages, and the chief liberty of the church, exclaimed a puritan in Elizabeth's parliament, had been a liberty to sin.[2]

This conflict of jurisdictions was fatal to a parliamentary union between church and state; for parliament was a court of law, but only a court of secular law, and a supreme court from which spiritual jurisdiction was withheld had little attraction for churchmen. Laymen had been drawn to Westminster because parliament was held three times a year to redress grievances and settle disputes about which the judges were in doubt. The clergy, indeed, participated in so far as they were subject to secular law, and clerical proctors presented clerical petitions in parliaments as late as the reign of Edward III.[3] But parliaments provided no remedy for abuses in the clerical courts; no writs of error could right a spiritual wrong in parliament, and for redress

[1] *Rot. Parl.*, ii. 244. The control of the courts christian over the criminous clerk ceased of course when the clerk ceased to be a churchman; but only the church could degrade him into a layman.

[2] D'Ewes, *Journals*, p. 167.

[3] Triers of clerical petitions in parliament were appointed in 1347–8 (*Rot. Parl.*, ii. 164). In 1366 there were petitions from the four mendicant orders and the universities of Oxford and Cambridge, which were not represented in parliament (*ibid.*, ii. 290); and in the Good parliament of 1376 petitions were presented from the clergy of the province of Canterbury, though it does not appear that those clergy were represented (*ibid.*, ii. 357).

against their official superiors the clergy must look elsewhere; appeal from them lay not to the king at Westminster, but to the pope at Rome.[1] The laity also suffered from this disability, but it went more to the heart of the church. Parliament was not the final resort for matters in which the affections of churchmen were mainly involved. The original motive which led to lay demands for regular parliaments did not exist for the church; and its absence reinforced the other inducements which counselled the clergy to abstain from participation in parliamentary business. The judicial system which linked the representatives of the laity to parliament did not bind the church to a temporal court; trial by their peers in parliament was repudiated by the prelates, and churchmen contended "that no clerk would be arraigned before the king's judges on any criminal charge, since for such cause no soul could judge them save the pope."[2]

Nor would they submit to the taxation of their spiritualties in parliament. The essence of frankalmoign, or spiritual tenure, was its immunity from temporal jurisdiction, and freedom from parliamentary taxation seemed a natural corollary of freedom from parliamentary jurisdiction. The claim appears in time to have been extended to all the property of the church, and clerical taxes were voted in convocations and collected by clerics appointed by the prelates.[3] The clergy, indeed, were a body of men set apart from the community, and the indelible character of priesthood sanctified their liberty. There is some justification for the protest against regarding church and state as two independent and rival communities, and for the contention that the "respublica christiana" was a single community governed by two sets of officers, the spiritual and the temporal magis-

[1] Cf. *Memoranda de Parl.*, pp. 34, 82, 111–12.
[2] *Rot. Parl.*, ii. 151–3.
[3] See my *Reign of Henry VII*, ii. 39–43. The voting of clerical taxes in convocation instead of in parliament dates back at least to 1339, when the Archbishop of York was adjured in parliament to urge his clergy to make liberal grants in their forthcoming convocation at York (*Rot. Parl.*, ii. 105–6).

trates.[1] But we cannot explain the issue of their strife by leaving out of account the army they strove to command. Constitutionally the *ecclesia* was a body of ecclesiastics, a corps of officers without any private soldiers. The privates at least were entitled to no benefit of clergy; they took no part in electing clerical proctors, and were not represented in the councils of the church. Clerical representatives represented no one but the clergy, and the house of commons would have resembled convocation if it had been elected by temporal magistrates. The circumstance that the bulk of the English people was represented in parliament, but not in convocation, has been the decisive factor in the constitutional conflict between the *regnum* and *sacerdotium*. The contest had not been unequal so long as parliaments consisted solely of councillors; but Edward I began to enlist the services of the English people in parliament, and thus decided beforehand the issue which was brought to a head by Henry VIII.

There were causes enough for the aloofness and aversion from parliaments shown by the church in the middle ages. Some were common to it and to other orders, and we have seen how the numbers of attendant barons and burgesses dwindled during the fourteenth and fifteenth centuries. The service was irksome, and the clergy disclaimed their liability. With them it was not a question of dwindling by special grace, but of total exemption by right. The bishops, of course, and the abbots, who held baronies of the crown, were summoned, or were liable to be summoned, as barons; and their only escape was to disown their baronial tenure. But the crown had a feeble claim to the suit and service of clerical proctors in the high court of parliament: they were not individually tenants-in-chief, and they did

[1] Figgis, "Respublica Christiana" in *Trans. Royal Hist. Soc.*, 3rd Ser., v. 63–88. Curiously enough Dr. Figgis' view is that of Marsiglio of Padua, who insists on the sovereignty of the *universitas fidelium*, as represented by the Prince. But Marsiglio was a prophet of the Reformation rather than an exponent of the medieval church. There are worse theories of the origin of the Reformation than that which ascribes it to the growth of Dr. Figgis' idea of the medieval church.

not, like the knights of the shire and burgesses, represent collective tenants-in-chief. The clergy of a diocese were not a *communitas* which farmed its own shire, or belonged, like a borough, to the royal demesne. Edward I, as a matter of fact, had never summoned the clergy by writ to parliament; he summoned the bishops *quâ* barons, but merely admonished them to bring their clergy with them. The writs that the priors, archdeacons, and proctors obeyed were not royal, but episcopal, and the clergy were really attending upon their bishops and not upon the king.

For a brief period down to 1332, and possibly later, their attendance was twofold, upon the bishops in parliament and upon the bishops in convocation. But insistence upon this double duty was quietly resisted by the clergy and tacitly abandoned by the crown; nothing less than a royal writ could secure lasting attendance in parliament, and even that failed to constrain most of the abbots to come. When, after the opening of each parliament, the various estates were told to withdraw and consider apart the business of the session, the clergy had not, like the knights and the burgesses, to devise a new *domus communis;* they already possessed in convocation a domestic organization, to which they naturally had recourse, and there they debated their grants and other responses to the demands of the crown. So far they were acting like other estates: the precise difference in procedure was that, instead of returning and announcing their decisions in parliament through the mouth of the Speaker, they communicated them through the prolocutor of convocation or through the prelates. As late as 1332 clerical proctors put in an appearance in parliament; but they deliberated apart, and in time their appearance in parliament ceased altogether. It was considered sufficient that convocation should meet simultaneously, and transact apart the business which would otherwise have required attendance in parliament. Occasionally the view was expressed that the assent of the clergy in parliament was essential to the validity of its proceedings, and in 1397 Sir Thomas Percy, steward of the

royal household, was appointed a clerical proctor for this purpose.[1] But this was a unique occasion, which prefigured Thomas Cromwell's vice-gerency; and the unanimous protest of the prelates in parliament was considered no bar to the statutes of provisors and præmunire.

This clerical retreat to their convocations, however costly it may in the end have proved to the national influence of the church, evaded some difficulties and coincided with ecclesiastical traditions. There were two convocations, not one, and when the clerical proctors ceased attendance in parliament, those for the northern province escaped the toilsome journey to London. Their convocation met at York, and its gathering there gratified the provincial feeling which tended to separate England north from England south of the Humber. It also avoided the scandalous scenes, of which there was always a risk, when the two archbishops met in the same assembly. Each prelate was jealous of his primacy, and neither would suffer the other to bear his cross before him. The archbishop of Canterbury had no jurisdiction over the clergy of York, and York had none over those of Canterbury. They were entirely independent one of the other; the only links between them were their common subordination to the papacy and to the crown. The latter kept them in order in the king's council and parliament, but the only presence that could secure unity in an ecclesiastical assembly in medieval England was that of a papal legate *a latere*.[2] Peace could be kept in a parliament where the archbishops sat as tenants-in-chief of the crown; it

[1] *Rot. Parl.*, iii. 348, 356; Cotton, *Records*, p. 368. Percy's was a singular appearance, as he was said to have full power and authority committed to him by the prelates and clergy of the realm, not of one province alone, and was a layman to boot. In this capacity he joined in the condemnation of Archbishop Arundel, and took the oath "pur et en nom del dit clergie" to observe all the resolutions adopted by Richard II's Shrewsbury parliament.

[2] The so-called "national" councils of the English church only met when the presence of a special papal legate gave them "national" unity by imposing a superior papal authority on the two provincial archbishops. The links between Canterbury and York were never both national and ecclesiastical: when they were national they were secular, and when they were ecclesiastical they were papal.

could not be guaranteed where clerical proctors sat under rival archbishops. Either, however, could reign supreme in his own provincial synod.

Of greater consequence was the fact that this provincial organization fell into line with the whole governmental tradition of the church. The papacy inherited from the empire its provincial system, and Constantine perpetuated the work of Diocletian. Nationalism was the antithesis of the Roman church and of the Roman empire, and no nation was made a province in either sphere; each was divided into two or more provinces, and the papacy never borrowed from the empire with greater success than when it adopted the imperial maxim *divide et impera.* Had not the English state, through the instrumentality of the crown in parliament, developed a stronger sense of nationality than the church, there could have been no national reformation and therefore no national church. The "establishment" of the English church consists in the secular framework of unity which the national state imposed upon two provinces of the Roman church; it could only be achieved by a complete repudiation of the Roman imperial and papal tradition.

Every manifestation of nationalism opened, in fact, a fresh breach with the catholic church. The growth of English language and literature led to demands for the use of the vernacular in the services of the church, while churchmen clung to their catholic Latin as an expression of unchanging unity in the church and a symbol of their segregation from the people. The cry for the bible in English, satisfied at first by translations from the Vulgate, produced at length translations from the originals, and undermined the authority of the catholic standard. The growth of national legislation in parliament, accompanied by the inroads of positive man-made law upon the old cosmopolitan laws of reason and of nature, produced English law out of the international legal systems of medieval Europe; and the more English our secular law became in the hands of English parliaments, the more certain and incessant would be its conflict with the canon law of the church, which,

if it changed at all, grew ever stranger to England. Church and state in England could agree fairly well so long as neither was national; they could not agree when one became more and more English and the other more and more Roman, nor even while one was becoming national at a much greater pace than the other. An insular commons and a catholic clergy could not be combined in an English parliament.

We must not, however, imagine that the barons, or even kings, were much more national than the clergy; and to regard their interested protests against papal interference as evidence of national resentment, is hardly more rational than to regard the same protests as proof of the independence of the church of England. There was too much particularism in England in the fourteenth century to permit of a really national movement against the papacy, and the petition of the barons in 1307 and the statutes of provisors and præmunire were instinct with medieval notions of liberty. They were designed to protect the peculiar rights and property of the king and his barons against ecclesiastical encroachment, and the animus is as much against the clerical courts in England as against the *curia* at Rome. The barons in 1307 contend that *seinte église . . . soit fundé par le roi et par ses ancestres et par les ditz contes, barons, et leurs ancestres*, and that, inasmuch as they had founded the church, they were entitled to its advowsons untrammelled by the claims of the ecclesiastical courts to all the goods of intestates and to all lands not specifically mentioned in testators' wills. They complain of the efforts of the pope and his clerks to secure cognizance of all debts, and to draw into the church courts all suits relating to the temporalties as well as to the spiritualties of churchmen; and they conclude with a rhetorical anticipation of ruin "unless God arises and His enemies are scattered" by the temporal prince and his council, with the assent of the nobles and magnates.[1]

[1] *Rot. Parl.*, i. 219; cf. *ibid.*, ii. 144–5. The description of the act of 1351 as "the first statute of provisors" (Stubbs, ii. 430) is somewhat misleading. The statute of Carlisle in 1307 had sought to protect the advowsons of lay patrons, and in 1343 parliament endeavoured to secure its better execution, but no answer to its petition is recorded on the "Roll." The statute of 1351, while reciting the statute of Carlisle, goes on to [illegible]ct the English ecclesiastical patrons.

This sounds like a first blast from the trumpet of Henry VIII, but the note is very baronial; the church is "founded" on property, and the liberty proclaimed is the right of secular property to determine spiritual preferment. The same is the purport of the statutes of provisors. No one is thinking of the national liberties of the English church; the freedom of election promised in Magna Carta has already disappeared, and the issue is between papal and royal or baronial nomination. It is royal and baronial rights of presentation that are to be protected against the Vicar of Christ and his appointments; and so far as national sentiment was involved, it was only concerned with the probability that English barons would prefer more English clerks than would a French or Italian pope. Already Englishmen's catholicism was breaking down before their prejudice against alien bishops; but the baronial objection to papal provision was the same, whether it was exercised on behalf of an English or a foreign clerk. The animus of the statute of præmunire was somewhat less sectional, but more comprehensively anti-ecclesiastical; it was aimed against all infringements of royal jurisdiction, whether by the papal *curia* or by any subordinate ecclesiastical court in England. No distinction was made between them, and English prelates supported the papacy with their protests in parliament.

Nothing, indeed, could be a greater travesty of the truth than the representation of these statutes as protests of English churchmen against the pretensions of Rome. After the days of Grosseteste there were few clerical protests against the papacy. Ecclesiastical chroniclers continued to grumble for a time at papal taxation; but they were soon more concerned with the encroachments of parliament on their immunities, and began to feel that the liberty of the church depended on papal protection. The pope was the supreme governor of the church,[1] and English churchmen made common cause with him against all forms of temporal jurisdiction. The endless petitions in parliament against the papacy are all petitions of the commons, against which the prelates protest, sometimes with and sometimes without

[1] *Rot. Parl.*, ii. 172.

success. The only point upon which the prelates concurred with the commons in disputing papal claims was in resistance to the payment of Peter's pence.[1] It was the laity, not the church, which attacked papal provisions, reservations, and even firstfruits.[2] There were many clerical petitions presented by the prelates in parliament, but not one was anti-papal. Their purport is very different: they complain bitterly that the king's courts imprison clerks against the law and liberties of the church, that lay ministers enter upon ecclesiastical fiefs in retaliation for the fines and dues levied by the clergy, that aids are exacted from churchmen who are exempt from parliamentary service and had not consented to their imposition, that people are forbidden to pay their tithes to God and holy church until the king is satisfied of his taxes. They contend that the king's judges have no jurisdiction over clerks, nor even over the laity in such matters as bigamy, matrimony, bastardy, and licences for mortmain; and they demand that prohibitions issuing out of the royal courts of justice, royal commissions of inquiry into the working of ecclesiastical courts, and summonses to the clergy to answer in chancery suits about tithes should cease, and that churchmen should be exempt from all tolls, purveyance, and so forth.[3] These were the coveted liberties of the English church; they constituted freedom from the English state, not independence of the papacy.

That freedom from Rome is fictitious. The crown might, and did, indeed, by means of its temporal jurisdiction protect to some extent English churchmen from the pope; the ecclesiastical courts provided no protection whatever. The

[1] *Rot. Parl.*, ii. 290; cf. ii. 336–9. The assent to these anti-papal statutes is always limited to "les contes, barons, et autres sages lais gentz du conseil" (*ibid.*, ii. 161), and often the dissent of the prelates is recorded (*ibid.*, ii. 284–5, iii. 264, 340–1).

[2] The Commons' petition in 1373 and 1377 against the payment of firstfruits (*Rot. Parl.* ii. 320, iii. 18) is an interesting anticipation of sixteenth-century legislation, and still more so are the proposals made in parliament in 1387 and 1413 that they should be paid to the king and not to the pope (*ibid.*, iii. 214), and that, owing to the papal schism, bishops elect should be confirmed by the metropolitan acting upon king's writs without further excuse or delay (*ibid.*, iv. 71).

[3] *Rot. Parl.*, i. 392, ii. 129, 151–3, 357–9, iii. 25–7.

famous statutes of præmunire set no limit to the pope's control over English ecclesiastical courts; their object was to defend the king's temporal jurisdiction from papal aggression working through the courts of the church. In 1348 a claimant to a living pursued his appeal to Rome; on his return to England he was sued and imprisoned, not because he was appealing from an English ecclesiastical court to the papal *curia*, but because he was bringing before the pope a suit belonging to royal cognizance; and his defence was that the living was held in spiritualty.[1] To appeals from English spiritual jurisdiction to the pope the English crown had not the least objection in the middle ages; such appeals were often facilitated by the crown, which discountenanced their reception in parliament.[2] It was its own temporal jurisdiction that the crown was concerned to protect; and it insisted upon that protection against both the lower courts christian in England and the highest court christian at Rome.

The strife was ever between English secular courts and catholic spiritual courts, and the evidence all points to the natural conclusion that English churchmen took their stand by the catholic church. Any other attitude has only been made to appear plausible by reading back into the middle ages the conditions of later times, when the hold of nationalism over Englishmen's minds had immensely strengthened, and the hold of catholicism had correspondingly weakened; and the unhistorical creation of a national church in the middle ages is the offspring of a desire to give the authority of antiquity to a conception which seeks to make the best of both ages, and to combine in the Anglican church of to-day the medieval advantage of freedom from the state with the modern advantage of freedom from Rome. That twofold liberty is by no means an impossible or an unworthy ideal, and the historian's only objection is to the claim of such an achievement to be a conservative or reactionary reproduction of medieval conditions. Similar arguments

[1] *Rot. Parl.*, ii. 178*b*.
[2] E.g. *Ibid.*, i. 3, 40*b*, 41–2, 375*b*, ii. 151–3, 161; Maitland, *Memoranda*, pp. 34, 82, 111–12.

from an imaginary past have been used to advance the causes of liberty, socialism, and nationalism, and most reformers have decked out their principles of progress with prehistoric plumage.

To the medieval churchman his duty in the conflict of laws was clear. By all that he held most sacred he was bound to cleave to the pope; every churchman took the oath of canonical obedience, while an oath of allegiance to the king was only taken by tenants-in-chief and officials. Those who took both, such as bishops, took first their oath to the pope, and were required to give it precedence. If they committed treason, it was for the pope, and not for the king or for the peers in parliament to condemn them. The king, indeed, maintained the contrary; but when Henry IV enforced this view at the expense of archbishop Scrope, his deed was regarded with horror and held to be the cause of the king's subsequent troubles. Churchmen stood by the laws and the liberties of their church; and the louder grew the claims of nationalism, the closer they clung to their privileges and to the protection of the pope. Some prelates, at least, preferred papal provision to the chances of election;[1] and the statute of provisors, it was contended in 1415, stopped the preferment of university students, starved the church of learned clergy, and thus promoted the growth of heresy and schism. The commons also on one occasion petitioned the crown for a remedy against the evil effects of that royal and baronial legislation;[2] but it was to papal protection that churchmen looked more and more for the safeguard of their faith and for the security of their liberties against the encroachments of parliament and of the royal courts.

In the face of these disruptive forces the wonder is not that parliament and the church should have fallen apart, but that churchmen should have retained so long the position they did. Church and state, however, had this much in common: both, in the higher ranks at least, had been permeated with feudal influence; and while the clerical proctors

[1] *Rot. Parl.*, ii. 154.
[2] *Ibid.*, iv. 81; cf. Nicolas, *Proceedings of the Privy Council*, i. 282, ii. 113.

disappeared from the houses of parliament, bishops and abbots remained. The crown might excuse the attendance of others, or allow them to be represented; but it successfully insisted upon the liability of its greater tenants-in-chief to a summons, and imposed fines ranging from forty to a hundred pounds on those who failed to obey. The force of passive resistance prevailed to some extent even among the greater tenants-in-chief; by Edward III's reign [1] twenty-eight abbots had already secured definite exemption from the customary summons, and while the number of barons sank from a hundred to less than fifty, the number of abbots declined from seventy-two under Edward I to a regular twenty-seven under Edward III's successors. Of the twenty-seven who were summoned few attended, and in 1513 it was declared by the judges that the presence of abbots was not essential to parliament.[2] When the philosophical historian comes to describe the decline and fall of the house of lords in modern times, he will probably attach no little importance to the habitual absence of most of the peers from their parliamentary duties; and similarly it may be pointed out that, had not some forty-five abbots evaded their summons to parliament, it would not have been possible for Henry VIII to obtain a majority for the dissolution of the monasteries. The church had done its best to abandon parliament before parliament surrendered it to the king.

In both cases the abandonment was merely the outward sign of a growing distaste and lack of sympathy. Churchmen would have continued to throng the high court of parliament had they continued to feel at home in its portals. But their heart was elsewhere; and while an encroaching nationalism increased the alienation, it weakened the feudalism which bound bishops and abbots and barons to the crown and to one another. Hildebrand had dreaded the corruption of the church by feudalism; but feudalism had at least saved the church from an isolation in which it could only stand secure so long as it retained its incorruption. The bond between the church and parliament was weakened, not

[1] Pike, *Const. Hist. of the House of Lords*, p. 349; cf. *Rot. Parl.*, ii. 119.
[2] *Letters and Papers of Henry VIII*, ii. 1131, 1313; Pike, p. 327.

because abbots and proctors feared corruption, but because they evaded their duties and feared the loss of their liberties. Taxation of themselves by themselves, self-made legislation, and independence of everything save of Rome, were their cherished desires; they chose isolation, and they fell from lack of support.

There was nothing strange in this isolation. The association of individuals in classes and the dissociation of class from class were characteristic of the middle ages; and in preferring to concentrate in convocation, instead of dividing their attention between it and parliament, the clergy were adopting the same policy as the commons themselves. Indeed the consolidation of estates in the house of commons imposed upon churchmen the alternative of absorption or separation. The definite parting of the ways is commonly placed in the reign of Edward II; but clerical proctors attended at least at the opening of the parliament of March 1332, when the prelates, remarking that some of the business propounded by Geoffrey le Scope on behalf of the crown was not within the competence of the clergy, suggested that they and the clerical proctors should separate from the laity for the discussion of their own affairs; the clergy, too, were dismissed with the knights, citizens, and burgesses after the six days' session, while the prelates, earls, barons, and councillors were ordered to remain.[1] Similar arrangements were made in the following December; but it had already become the practice to hold convocations simultaneously with a parliament, and thither the clergy resorted when they retired from the parliament chamber to discuss their parliamentary business. The clerical committee or estate of parliament was absorbed in the lower house of convocation, and it became impossible to distinguish between the *personnel* or the action of the clerical proctors summoned to parliament and of those summoned to a provincial synod.[2]

[1] *Rot. Parl.*, ii. 64*b*, 65*b*, 67.

[2] Makower, *Const. Hist. of the Church*, p. 355. Nor is there a clear distinction in medieval terminology, though now it is usual to reserve the word "convocation" for the provincial assembles of Canterbury and York summoned by royal writs, with the *præmunientes* clause, as a

In 1339 it is clearly in convocation that the clerical proctors voted their grants to the crown.[1] The dissociation from parliament involved also a dissociation of the proctors of York from those of Canterbury; for if the two convocations ever sat together (except when a papal legate *a latere* held a "national" council) the practice was soon discontinued, and at the close of the middle ages the convocation of York did not commonly meet at the same date as that of Canterbury or as parliament. Indeed, it was clearly impossible for the archbishop of York and his suffragans to be simultaneously in their places in parliament at Westminster and in convocation at York.

Abstention from attendance in parliaments on the part of the lower clergy did not, however, mean an absence of clerical petitions; and at first the clergy seemed to lose nothing by their retirement. In 1340 their petitions were read after those of the commons by the king's order, and statutes were made to give them effect with the assent of all the estates.[2] A hardly less pleasing harmony was exhibited as late as 1376, when the commons of York presented a petition against the excessive fees extorted by the archbishop from his clergy.[3] But by that time harmony was exceptional, and a rift had developed between the commons and clergy. The petitions of the clergy continued, throughout the fourteenth century, to be presented and read in parliaments, and the practice was for the judges to be required to assemble in the presence of some of the prelates and provide a remedy.[4] To this habit the commons offered an increasing resistance, and in 1377 they asked that no ordinance should be made in parliament without their leave on a clerical petition, and that the commons should not be bound by constitutions adopted in convocation; "for," they declared, "they do not wish to be bound by any statute

part of the parliamentary system, and to describe the other provincial and diocesan assemblies, summoned merely by the archbishops and bishops, as "synods." Synods might be summoned at any time, convocations only with parliament.

[1] *Rot. Parl.*, ii. 106.
[2] *Ibid.*, ii. 113, 244.
[3] *Ibid.*, ii. 352.
[4] *Ibid.*, ii. 358.

authority with his control of the state was a precedent for the combination under Henry VIII. If there was to be national autonomy in church as well as in state, and if the two corps of ecclesiastical and secular officers were to be united under a single command, the crown was a more natural head than a cardinal; for nationalism was inherent in the state, but exotic in the church, and a legate of the pope could only play at independence of the papacy.

Wolsey himself clearly foresaw and foretold that with him would fall the liberties of the church. Like other medieval liberties, they passed by the grace of parliament into the hands of the crown. It was a comprehensive but incomplete process of nationalization, in which the act of supremacy and the act for the submission of the clergy were merely details. These were but trifles compared with the revolution which made it possible to call the laity churchmen, and then to term them "religious"[1]—a revolution brought to its consummation when men began to expect the appeals which move their souls to fall, not from the lips of official clergy, but from those of the poet, the playwright, the philosopher, and even the politician. Fundamentally the movement was one to equalize churchmen and laymen by reducing the liberties of the church; and extremists would have whittled away to nothing the difference between the two, pronouncing every man a priest and abolishing the "Aaronic" vestments, benefit of clergy, and ecclesiastical jurisdiction. The clerical estate was to be merged in the national state and its affiliations with the international papacy to disappear. In its political and constitutional aspects the reformation was no more than a stage in the progress of nationalism and medieval petitions in parliament provided precedents for most of Henry's acts. The payment of annates and the

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to the convocations of the two provinces the appearance of a national council of the Church. Overriding Archbishop Warham's summons of the Canterbury convocation to St. Paul's, he summoned both it and the York convocation to meet before him at Westminster in June 1523 (*Letters and Papers*, iii. Nos. 3024, 3239).

[1] The "religious" in the middle ages were the members of the religious orders; no parish priest could be religious, and the change of "religion" in Henry VIII's reign was primarily the dissolution of the monasteries.

pursuit of appeals to Rome had been attacked in the fourteenth century, as well as the papal appointment of prelates; and even an archbishop had asserted the right of the crown to prevent the translations and defy the excommunications of the pope.[1] Nationalism was, in short, invading the church on its march to its modern omnipotence; and in the latest of days we have seen international bonds, whether in the form of socialism or finance, pacifism or catholicism, shrivel like wisps of straw in the consuming fire of national passion and prejudice.

The loss of the church's liberties increased those of the crown and threatened those of the people. It is not, indeed, that the rôle, ascribed by Lord Acton to the catholic church, of protecting the liberties of the individual against the tyranny of the state has been filled with much success. Countries in which the catholic church retained its liberties between the Reformation and the Revolution were not conspicuous for the freedom enjoyed by the individual or by the nation; and liberty was not more at home in France, Italy, and Spain during the seventeenth and eighteenth centuries than it was in England, Holland, and America. For it was not with other people's liberties, or with liberty in general that the church was concerned, but with its own; it interfered, not to save victims from the state, but to claim them for itself, not to enforce freedom, but to establish jurisdiction. Its ideal was medieval independence, and not modern liberty. Nevertheless, the concentration of medieval liberties in the crown, which created modern sovereignty, was a menace to liberty from which England, Holland, and America were saved, not by the reformation, but by revolt against their monarchs. The great rebellion of 1642 sprang in a sense from the Tudor acts of supremacy.

For those acts of 1534 and 1559 united two incompatible forms of sovereignty—the absolute jurisdiction of the pope, instinct with Roman tradition, and the limited jurisdiction of the king, with its Teutonic and feudal restrictions. Care had, indeed, been taken in drafting the acts to meet the

[1] *Rot. Parl.*, iii. 304.

consequent danger; and the crown, as supreme head or governor of the church, was only authorized to exercise such jurisdiction as properly belonged to the ecclesiastical courts; otherwise, said the lord chancellor, Audley, in a significant conversation with Bishop Gardiner, "you prelates would enter in and order the laity as you listed."[1] Coke fought a long battle in defence of Audley's interpretation; but only the great rebellion brought success to his cause. For the acts of supremacy had made the crown the keeper of its own conscience, the judge of its own liberties, the controller of its own powers. In the middle ages the courts christian had been restrained by those of the crown, and those of the crown by those of the church. But was the crown to restrain itself? were prohibitions of the king's bench to impede the high commission? was præmunire to limit the royal supremacy?[2] The crown could be trusted in the middle ages to see that the courts christian did not overstep the mark; but would it be equally jealous of their liberties when they exerted a royal jurisdiction and proclaimed the divine right of kings? The court of high commission answered the question, and Charles I and Archbishop Laud paid with their heads the penalty.

The civil war of the seventeenth century was thus prepared by the least constitutional measures of Henry VIII, for the act of supremacy was really a revolution. That there was something fundamentally unconstitutional in Henry's government has been widely felt, but wrongly expressed in the constitutional terms of a later age. Parliament became so closely identified with the constitution that nothing done by parliament was regarded as unconstitutional, and every unconstitutional course was interpreted as an infringement of parliamentary liberties. So men were led to express their conviction of Henry's tyranny by attempt-

[1] Gardiner to Somerset, October 14, 1547, Foxe, *Acts and Monuments*, vi. 43.

[2] "How," asked James I, "can a king grant a *præmunire* against himself?" (*Political Works*, ed. McIlwain, 1918, p. 334). Bishop Gardiner, in the letter quoted above, expressed a similar disbelief in the possibility of restraining by *præmunire* a minister of the king.

ing to prove his designs upon parliamentary independence. But the least constitutional acts of Henry's reign were acts of parliament, and he strained the constitution by expanding, and not by restricting, the sphere of its activity. He did not minimize, but magnified parliament. Under his rule its privileges were consolidated, its *personnel* was improved, its constituency enlarged, its political weight enhanced in foreign eyes, its authority increased, its sessions made more frequent and prolonged. He did not invade parliamentary liberties; he led a parliamentary invasion of the liberties of the church and of feudal franchise.

Under his impulse parliament was called upon to deal with clerical privileges, papal jurisdiction, and even with matters of faith; and the chief constitutional demands of the Pilgrimage of Grace were that the church of England might enjoy the liberties granted by Magna Carta and "used until six or seven years past," and that spiritual matters should be dealt with by convocation. These were liberties denied by parliament, and not to parliament; and this parliamentary invasion was unconstitutional in the sense that it was based on a novel theory of an omnicompetent "crown in parliament," and on a repudiation of a jurisdiction, the independence of which had been acknowledged and enjoyed for centuries. The English clergy, indeed, made their submission in both their provincial convocations; but the abandonment of the catholic position by two provinces was not, and could hardly be, regarded as constitutional by the rest of the catholic church. The revolution only became constitutional through the process by which triumphant treason ceases to be treason, that is, by success, and by the recognition of the supremacy of the crown in parliament over all competing jurisdictions. The constitutional aspect of the Anglican Reformation can only be summed up in the dubious maxim *quod fieri non debuit, factum valet;* and nations have ever since paid toll for a national sovereignty which is based on the sixteenth-century claim of parts of mankind to independence of the rest.

CHAPTER XI

THE GROWTH OF SOVEREIGNTY IN PARLIAMENT

It has been said that the supreme achievement of the Reformation is the modern state.[1] The truth that lies in an epigram often bears restatement in a reversal of its parts, and it might be as true to say that the Reformation was the supreme achievement of the modern state. Certainly in England it was largely the work of the Tudor monarchy, which was rather a cause than a result of the Reformation. There is, however, a fundamental truth in this connexion between the Reformation and the modern state, and it concerns the nature of sovereignty. Without the Reformation there could have been no such thing as modern sovereignty; for the sovereignty of every medieval monarch in western Christendom was limited by the recognized claim of the pope to hold kings responsible for certain of their acts and to inflict pains and penalties for the infraction of certain rules of conduct. They were not exempt from citation to Rome, and they could not afford to assert that divine right of irresponsibility with which protestantism endowed their successors.

It would, however, be a mistake to regard this achievement of sovereignty as an act of creation. The crown in parliament is legally omnicompetent, because it was never created, because there never was made that social contract to which philosophers in the pre-scientific ages of history were wont to ascribe the origin of the state. The act of creation involves the relation between creature and creator, and the purpose of the theories of contract was to impose the limitations

[1] Figgis in *Cambridge Modern History*, iii. 736.

involved in that relation, and to bind sovereignty down to the terms and conditions that pleased its imaginary creator. Wherever a constitution has been made, and power has been conferred by a definite act, limitations have been imposed by its makers. But no one made the English crown or the English parliament, and no powers have been conferred upon them; for that reason they are unlimited. No one has had the right to confer, and therefore no one has had the right to limit their sovereignty. It grew, and things that grow have a power divine beyond that of things that are made with hands.

The slow evolution of sovereignty in England precludes any theory of its special creation at any particular period; and the process reaches back beyond the middle ages and spans the whole course of English history. If it is an error to regard sovereignty as the creation of the age of Luther and Machiavelli, it is a greater error to regard the English constitution as complete in the reign of Edward I. In spite of the growth of parliament during the fourteenth century and of the Lancastrian experiment, it is the imperfection rather than the perfection of government that strikes the observer at the close of the middle ages. The burden of Fortescue's complaint is the lack of governance in England, and Machiavelli attributed the political ills of his time to lack of will. He was thinking, not of the individual will which superabounded in the over-mighty subject, but of will in the state. The "Rolls of Parliaments" are full of lamentations over the king's failure to execute justice; and a profounder study than these plaintiffs gave to the subject suggests that it was the king's power rather than his will which was at fault. Nor was the lack of governance a novel grievance: under the "greatest of the Plantagenets" complaints are made in parliament of livery and maintenance, champerty and riots; and petitioners allege that no truth can be obtained of juries, so corrupted are they by rich men's bribes.[1] The captains and ringleaders of anarchy were, no doubt, greater men in the reign of Henry VI than in that of Edward I, but

[1] *Rot. Parl.*, i. 96, 183, 201; Maitland, *Memoranda*, pp. 109, 286–7, 305.

the concentration of the forces of disorder in fewer hands did not necessarily increase the extent of the evil, and weakness of government was endemic throughout the middle ages.

Nothing, indeed, could be wider of the mark than the popular identification of feudal times with royal despotism or of the progress of constitutional liberty with the whittling away of sovereignty. Freedom without sovereignty is the idle dream of anarchists; and sovereignty without freedom is the aim of bureaucratic despots. Neither is safe without the other, and it was the absence of national sovereignty that left medieval England a prey to feudal disorder. The government, as Maitland has remarked, was occupied less in governing than in struggling for existence; and the impediments that hampered its action were not merely material forces, but the ideas of liberty and law which were ingrained in medieval man. Some were due to intellectual immaturity. When the law confessed its inability to discriminate between murder and homicide, proclaimed that "the thought of man shall not be tried, for the devil himself knoweth not the thought of man," [1] and only distinguished crimes of violence according to the accidents of the time and place of their committal, there was little hope of justice, and inadequate security for execution so long as the individual was entitled to defeat the law by "standing mute." [2] To this deep-seated distrust of human capacity or rectitude was due the resort to judicial methods like trial by fire or water, by which the hope of justice was frankly abandoned to the miraculous interposition of superhuman powers, an attitude of mind which still survives in the belief that victory in battle is a judgement of God.

This disbelief in human achievement, natural enough in the early stages of political evolution, explains the medieval conception of law. Nowadays law is regarded as something which man has made; then man could not make law at all.

[1] Maitland, *Collected Papers*, i. 304, 315, 453.
[2] Not abolished until 1772. Cf. L. Vernon Harcourt, *His Grace the Steward and Trial by Peers*, p. 228.

It had been made for him, directly by God in the form of divine law, or indirectly by God in the forms of the law of nature or the law of universal reason. Really this law was custom sanctified by the church; but whether regarded as custom in heathen communities or as the direct or indirect expression of the divine will in Christian states, no king or parliament could make, repeal, or amend it. They might proclaim or apply it, but they could not create it; it was immutable and eternal, and all alike, prince and people, were subject to its dictates. These laws, however, required an interpreter, especially since they often conflicted. Few schools of political thought have failed to find justification in the laws of nature, or of reason, or of God—from the absolutist to the tyrannicide, from the individualist to the communist; and the conflict of laws demanded a supreme arbiter in the interests of peace. Sovereignty, therefore, appears in a judicial guise and sits in a court of law; and the king in his council in parliaments interprets the law before he pretends to make it. Our earliest laws—apart from customs which are not conscious creations—are judicial decisions. Indeed, most formal acts in the early middle ages were regarded as the judgements of a court: even a declaration of war was a *judicium super eum ire*,[1] and from it descends the right of the high court of parliament to consultation on such issues. Treaties of peace are recorded on the rolls of that court as late as 1420.

A decision in court, however, makes law, and legislation begins under judicial forms. But the ordinances of Edward I, for instance, should be regarded rather as general instructions to judges and others in their administration of existing law than as deliberate and conscious efforts to alter the law. Magna Carta was a treaty rather than an act of legislation, and with its corollaries, the *Confirmatio Cartarum*, and the *Articuli super Cartas*, continued to be regarded as fundamental law, infractions of which, even by parliament itself, were *ipso facto* invalid.[2] But constitutional and social

[1] Vernon Harcourt, *His Grace the Steward and Trial by Peers*, p. 248.
[2] *Rot. Parl.*, i. 285.

development was outgrowing rigid conceptions, and the law which satisfied past generations had to be supplemented: even the constitution of the United States has required amendment. The medieval supplements to the constitution of the world took the form of positive law, that is, of law imposed by human authority. But this law, made by man, was inferior to the older laws of God and nature: those were, so to speak, the constitution, these the provisional regulations made under its authority. The prince was above the laws he made, but subject to those of God and nature;[1] an offence against the latter was *malum in se*, an offence against the former was only a *malum prohibitum*.[2]

It was from these immutable laws that medieval liberties were derived: they were absolute rights, not the concessions of human authority. Kings and parliaments had not given them, kings and parliaments could not take them away. Louis XIV declared that even he, with his plenitude of royal power, could not deprive his grandson of his hereditary right to the Spanish throne.[3] Hereditary right was divine, and the monarchical character was indelible: not all the water in the rough, rude sea could wash the balm off an anointed king. So thought Richard II, Mary Stuart, and Charles I. As with the *regnum*, so with the *sacerdotium*; and not until 1870 did the English parliament admit that a clerk in Anglican orders could divest himself of the indelible character of priesthood.[4] The peerage was not to be outdone by priests or kings; in the course of time it established for itself an indefeasible privilege which kings and priests have lost, and in 1894 three eldest sons of peers attempted in vain to evade the impending doom of a nobility inseparably blended with blue blood.[5] Thus is man's liberty impeded by the barriers he has sought to raise in its defence.

[1] "Positiva lex est infra principantem sicut lex naturalis est supra" (Marsiglio of Padua, quoted in Maitland's *Gierke*, p. 176).

[2] Prothero, *Select Documents*, 1898, p. 402; Coke placed the common law almost on a level with the older fundamental laws.

[3] Torcy, *Mémoires*, ed. 1850, pp. 710–11.

[4] 33 and 34 Vict. c. 91; Anson, *Law and Custom of the Constitution*, 1908, II. ii. 326–7.

[5] See below, pp. 274, 306.

These were the liberties of the great, but those of the humble were based on the same foundation of imprescriptible right. Private property was by some medieval thinkers placed outside the sphere of public power,[1] not indeed on the ground that it is inherited, but because it originates in the labour of the individual, and was thus a right independent of the community. Citizens were regarded as shareholders who could not be deprived of their shares by a vote of the majority or by any other means than their own voluntary concession.[2] Medieval history, says Stubbs, is the history of rights and wrongs, to be followed by a modern history of powers, forces, dynasties.[3] In theory every one's right was indestructible; society was, in fact, static and not dynamic. There was no power to reform a right, and the only way to dispose of it was to prove that it was "usurped"—like the supremacy of Rome. In practice, of course, the absence of means of legal redress led to violent measures on the part of those who felt themselves wronged or incommoded by the rights of others. The legal employment of torture was probably due to the same process of thought; even the criminal must consent to plead or confess, and without his individual surrender there could be no legal verdict. The weakness of the state was the parent of its cruelty. It was hemmed in by iron laws and indestructible rights; it could not create or modify the conditions of its existence, and the "Rolls" of medieval English parliaments are records of their conscious infirmity.

The greatest of all these limitations imposed on the state were those imposed by the church. Indeed, from Hildebrand onwards papalists had contended that the state had no rights or powers at all except in so far as they were derived from, and controlled and guided by, the church: *papa ipse verus imperator*, declared the canonists of the twelfth century, and the prince only wielded the sword as the officer of the pope. The pope was the judge, the king the executioner.

[1] John of Paris, quoted in Maitland's *Gierke*, p. 180.
[2] *Ibid.*, p. 167; cf. *Collected Papers*, ii. 318–19.
[3] *Lectures on Medieval and Modern History*, ed. 1887, p. 239.

Spiritualis judicat omnia et ipse a nemine judicatur.[1] The pope should elect the emperor, and the English clergy their king.[2] The king was the minister of the church, and was subject to its law, not merely the divine law, but the canon law, the *lex positiva* imposed by the pope. This was universal law, and municipal legislation like acts of parliament, which conflicted with it, was *ipso facto* null and void. The original sin of the Reformation was its rejection of this catholic law; thence sprang all its schism, its heresy, and sacrilege. Nor did even the champions of the *regnum* against the *sacerdotium* claim any plenitude of legislative power for the emperor. He and *à fortiori* lesser princes were limited by divine and natural law, by papal jurisdiction, and even by the will of the people, from whom imperial sovereignty was derived. An obdurate monarch might not only be condemned by the pope, but killed by his people, provided that they selected some method of tyrannicide countenanced by biblical precedents, and not such new-fangled means as poison.[3]

The political theory of the middle ages, indeed, knows little of absolute authority except that vested in the papacy; and in practice the forces of feudalism left little room for the exercise of sovereignty. The depths, to which the empire sank, submerged the cause for which it had stood, but the rise of national monarchy rescued the world from the impotence of authority. In the reign of Philip IV of France, Pierre Dubois proclaimed the decadence of the empire, and, arguing that right without might was vanity, claimed for kings the emperor's inheritance.[4] Later in the fourteenth century Marsiglio of Padua, the most modern and original of all medieval political thinkers, outlined in his *Defensor Pacis* a comprehensive theory of the sovereignty of the state.

The church, he maintains, is a state [civic] institution, and the *sacerdotium* is "pars et officium civitatis." Sovereign in things ecclesiastical is the

[1] Maitland's *Gierke*, pp. 107–12.

[2] *Ibid.*, pp. 117–18; William of Malmesbury *apud* Stubbs, *Select Charters*, ed. 1900, p. 117: "Coram majori parte cleri Angliæ, ad cujus jus potissimum spectat principem eligere simulque ordinare."

[3] John of Salisbury, quoted in Maitland's *Gierke*, p. 143; Dunning, *Political Theories*, p. 187.

[4] Dunning, *ibid.*, p. 228.

"universitas fidelium," which, however, coincides with the "universitas civium," and in this respect, as in all other matters, is represented by the *principans* whom it has instituted, so that the line between spiritual and temporal is always a line between two classes of affairs and never a line between two classes of persons.[1] The state [civic] power imposes conditions for admission to the *sacerdotium*, regulates the functions of the priesthood, fixes the number of churches and spiritual offices. It authorizes ecclesiastical foundations and corporations. It appoints the individual clergyman, pays him, obliges him to a performance of duties, removes him, nay, its consent is necessary to every ordination. It watches over the exercise of every spiritual office, to see that it is strictly confined to spiritual affairs. All *jurisdictio* and *potestas coactiva* are exercised immediately and exclusively by the wielder of temporal power, even if clerical persons are concerned, or matrimonial causes, dispensations, legitimations, or matters of heresy. Interdicts, excommunications, canonizations, appointments of fasts and feasts require at the very least authorization by the state [community]. Only on the ground of express commission from the state is it conceivable that the churches should have any worldly powers or the decretals any worldly force. Education is exclusively the state's affair. Appeals and complaints to the state [civic] power are always permissible. All councils, general and particular, must be summoned and directed by the state. Church property is in part the state's property, and in part it is *res nullius*. In any case it is at the disposal of the state, which thereout should provide what is necessary for the support of the clergy and for the maintenance of worship, and should collect and apply the residue for the relief of the poor and other public purposes. The state therefore may freely tax it, may divert the tithes to itself, may give and take benefices at pleasure, and for good cause may secularize and sell them "quoniam sua sunt et in ipsius semper potestate de jure." Only what has come from private foundations should, under state control, "conservari, custodiri, et distribui secundum donantis vel legantis intentionem."[2]

It was not without reason that Thomas Cromwell financed the publication of an English edition of Marsiglio's *Defensor Pacis* in 1534, or that his friends recommended its perusal to Cardinal Pole and the monks of the Charterhouse;[3] for Marsiglio had provided Cromwell and some of his successors with the best part of their programme.

[1] This is perhaps the crucial distinction between the medieval and modern points of view. Medieval papalists, indeed, agreed with Marsiglio to some extent, and claimed predominance of the spiritual authority over every person in every sphere, on the ground that man's soul was superior to his body. But in practice the contest between state and church led to a separation between the persons in whom the spiritual character predominated—*i. e.* the clergy—and the laity, the former being primarily subject to the church and the latter to the state.

[2] This is Maitland's translation of Gierke's summary of Marsiglio's views; he gives references for each sentence, pp. 191–2; but "civic" would perhaps be a better translation than "state" as an adjective, and "community" as a substantive.

[3] *Letters and Papers of Henry VIII*, vii. 423, viii. 1156, ix. 523. Nor is it surprising that one of the monks should have burnt the volume lent him for his edification.

He was a dreamer of dreams. The lawyers and statesmen of his time were hard pressed to secure a foothold or two in Marsiglio's promised land; and the boldest of legal fictions and the hardiest of assumptions had to be made by the *principans* to extend that field of positive law of which he was master, at the expense of that field of natural law to which he was subject. The secular prince borrowed most of his maxims from the law of the church, a sphere in which the pope's claims to divine authority had enabled him to exalt his *lex positiva* above the *lex naturalis;* for the pope was, so to speak, the *legatus a latere* of God, while nature and reason were merely *legati nati* whose authority was overridden by special commission. From the canon law was taken the phrase *ex certa scientia*, whereby the statute or ordinance disposed of the defect arising in natural law from the absence of "just cause" for the invasion of private rights; from it, too, came the *lege non obstante* clauses, which calmly assumed the plenitude of the sovereign's power over all other laws.[1] Richard II, however, borrowed wholesale; he not only claimed to be "entire emperor" in England, but appropriated the contention of Boniface VIII that he had *omnia jura in scrinio pectoris sui;*[2] and in many other respects he attempted to anticipate the new monarchy. But the time was not ripe, and Richard himself was not the man to wield the sceptre of a saviour of society. The Lancastrian experiment and the Wars of the Roses were still required to convince the English people that sovereignty was a necessary supplement to liberty, and the Reception, the Renaissance, and the Reformation were needed to complete the rout of feudalism and fortify the monarchy.

The reception of the Roman law by almost all the kingdoms of western Europe was one of the great movements which marked the close of the middle ages. It completed

[1] Maitland's *Gierke*, p. 185. For an early use of *non obstante* in England see *Rot. Parl.*, ii. 167.

[2] Maitland's *Gierke*, p. 176; cf. *Letters and Papers of Henry VIII*, iv. p. 1839; *Rot. Parl.*, iii. 343. Richard was accused of having said "quod leges suæ erant in ore suo et aliquotiens in pectore suo; et quod ipse solus posset mutare et condere leges regni sui" (*ibid.*, iii. 419).

the *translatio imperii* from the moribund Holy Roman emperor to the lusty national king, who appropriated the legal effects of the deceased world-sovereign. Technically the Roman law was never "received" in England, and the resistance of homespun English law is a momentous chapter of English legal history.[1] But English law was only successful in its resistance because in the earlier stages of its existence it had been inoculated by Henry II and the *curia regis*, as well as through the canon law, with some of the principles of the rival system, and was therefore the better prepared to withstand the legal epidemic of the sixteenth century. Even so the struggle was long and arduous, and did not end till the revolution of 1688 expelled the Stuarts and gave the victory over the civilians to the common lawyers. In the interval between the premature efforts of Richard II and the fall of his followers, the Stuarts, maxims of Roman civil law played a great part in English history, a part which, though dangerous to self-government, was essential to the establishment of the sovereignty of the state. "If we should do nothing but as the common law will," wrote the president of the Council of Wales with respect to Welsh disorders, "these things so far out of order will never be redressed"; [2] and the prerogative courts and councils of the Tudors found in the Roman law indispensable aids to the suppression of local anarchy. Tudor officials were nearly all trained in the civil laws, and while the study of canon law was forbidden by Henry VIII, attempts were made to found a college of civil law at Cambridge, and chairs of civil law were endowed at both universities. Civil law was an apt weapon against both the canon and common law, and "imperial" became one of the favourite adjectives of the crown.

While the invasion of Roman law released sovereignty from the trammels of common law, the Renaissance tended to relax the restraints of morality; and Machiavelli, the

[1] See Maitland, *English Law and the Renaissance*, 1901.

[2] Rowland Lee to Cromwell, July 18, 1538; the letter is abbreviated in *Letters and Papers*, XIII. i. 1411; cf. Skeel, *Council of Wales*, p. 68.

political philosopher of the Renaissance, has been acclaimed as one of the fathers of the modern state. His offence was not so much that he invented political immorality, as that he laid bare the secrets of princes, and treated politics as a science and an art with its own principles and technique which were, like those of surgery or navigation, independent of morals. The state was the only available instrument for the work of political reformation, and it could only achieve that work by being liberated from the conventions of medieval thought which had left society bankrupt at the close of the fifteenth century. Machiavelli's contribution to political sovereignty was his assertion of freedom of will for the state.

Luther's was his assertion of its freedom from the papacy,[1] and the Reformation broke one of the bonds which fettered the sovereignty of kings; it rendered them irresponsible except to God. While Machiavelli, like Hobbes, contemplated the possibility of a sovereign republic, Luther tied his cause to the chariot wheels of German territorial princes, and his political theory evoked many echoes in the England of the Tudors. The jurisdiction of the pope was abolished as "usurped," and canon law was subjected to royal veto. The king was thus *lege solutus* so far as the greater portion of medieval law was concerned; and of the law that remained he was the final arbiter. From Roman civilians he learnt that *quod principi placuit legis habet vigorem;* and even the common law of England could now be made and unmade by the crown in parliament, and interpreted by the king's own courts. The crown in parliament was emancipated from the control of fundamental law and from the medieval liberties which were derived therefrom. The conflict of independent legal systems was at an end; they were all fused in national law and subjected to a common sovereignty. There was only one divine right, and that was the right of kings; all the rest were "usurped." The king was the supreme head of one body.

The medieval distinctions between churchmen and laymen were swept away or reduced to insignificance, and laymen

[1] He may also have helped by his denial of free will to the individual.

in time were even called churchmen. Ecclesiastics were required or encouraged to assimilate the habits and customs of their flocks, to discard their clerical vestments and assume the bonds of matrimony. The concentration camps of monasticism were broken up, and their inmates dispersed among the civil population. Every form of loyalty except allegiance to the national king was discouraged; and the characteristic hostility of the Roman law to every association that weakened the direct connexion between the state and the individual was reflected in the attitude of Tudor statesmen to corporations.[1] Ecclesiastical colleges and chantries felt the brunt of this animosity, but secular guilds and municipal corporations found their liberties restrained by acts of parliament, and their freedom of internecine legislation controlled by chancery. Medieval rights gave way to modern law, and all municipal authority was regarded as a concession from a sovereign parliament and not as a derivation from imprescriptible right. The passion for national independence left little room for the independence of church, class, or corporation; the many estates were fused in the single state, and their liberties were confiscated in the interests of national sovereignty. The revolts of the Tudor period are nearly all local, sectional, or ecclesiastical protests against this national consolidation. The Cornishmen in 1497 resent taxes levied for the defence of the Scottish borders: the Pilgrims of Grace complain of the neglect of the house of lords to begin each day's proceedings with the time-honoured recital of the first clause of Magna Carta, and of the transgression by statute of the liberties of the church;[2] and the northern earls ie 1569 were fighting a last fight for feudal freedom from the state.

This monopoly of sovereignty was something new in English and in other history. There was little of it in the middle ages, but only suzerainty of many sorts. Every lord

[1] See above, pp. 174–6.
[2] *Letters and Papers of Henry VIII*, xi. 1182 (2), xii. pt. i. 401; Dodds, *Pilgrimage of Grace*, i. 360.

was "sovereign" to his man, and every master to his servant. Even an archbishop was "sovereign" to his suffragans, and a husband to his wife.[1] To kill one's lord was treason, petty it is true, but none the less a worse offence than murder. What real sovereignty there was had been discovered by the pope when he stepped into the shoes of the Roman Imperator, and he alone was sovereign in the modern Austinian sense. For the barbarians had not only shattered Roman empire, but dissipated sovereignty, and it easily slid down the slippery slopes of the feudal pyramid. Much of it passed, for instance, from the king of the French to the Norman duke, from the duke to the Angevin count, and from him to the count of Maine, before it sank into the minds of the people of Le Mans; and a sovereignty which had to satisfy so many mouths was a diluted form of political authority. The medieval *prerogativa regis* was a purely feudal conception;[2] the king was regarded as simply paramount landlord, and his prerogative only affected his subjects *quâ* tenants.

But the royal prerogative of the Tudors affected their relations with every subject irrespective of his tenure; the "sovereignty" of masters over men, and with it petty treason, almost disappeared in one conception of sovereignty and a single notion of high treason. Even the sovereignty of the pope had had its rivals; that of the Tudors had none. The subject's relation to the crown became his political all in all. All the liberties and jurisdictions which had intervened between the subject and the national sovereign were abolished, and Englishmen were brought into direct and constant contact with the state. The relationship, therefore, assumed an overwhelming importance, and created a problem of absorbing magnitude. Sovereignty might be tolerable while

[1] 12 Henry VII, c. 7: "their master or their immediate sovereign"; *Rot. Parl.*, ii. 244–5: "et le dit evesque . . . eit receu mandement de . . . son soveregn erchevesque"; *Paston Letters*, i. 78: "to my soveregn, John Paston"; *Rot. Parl.*, 4 Henry VIII, prefixed to *Lords' Journals*, vol. i. p. xxix: "that every lord espiritual and temporal and every sovereign of monastery . . . that every such lord, sovereign, master, mistress, or other householder;" *Taming of the Shrew*, Act v. Sc. ii. 147: "Thy husband is . . . thy sovereign."

[2] On the so-called statute *Prærogativa Regis*, see Maitland, *Collected Papers*, ii. 182–9.

it was distributed in many hands; it took on a forbidding aspect when gathered into one. Contact often means conflict, and popular hostility is only aroused by the jurisdiction with which people are brought into touch. Hence the popular risings and resentments of the middle ages were directed against ecclesiastical and feudal jurisdictions, because those were the authorities under which most men suffered. There were no really popular rebellions against the crown; the movements against the crown were baronial or ecclesiastical, because it was the crown which threatened the liberties of the magnates and the church.

But now the crown has absorbed and wields these jurisdictions; the buffers are removed, and a king who demands the undivided loyalty of his subjects runs the risk of their undivided disaffection. The crown has enveloped church and state alike in the ample shield of its supremaey, and that shield must bear the brunt of every attack on the powers the crown has absorbed. Every movement for liberty becomes an attack on the crown: the strife is no longer between barons or bishops and the king, but between the king and his parliament or his people. The crown had become the universal agent and everybody's proxy; and its monopoly of powers involved a monopoly of responsibility. Medieval sovereignty, dispersed in local franchises and in the privileges of orders and estates, and bound down by fundamental laws, might be irresponsible; but modern sovereignty, triumphant over canon and over common law, and over all excluding liberties, must be made responsible or must be dismembered. It was well that Leviathan should have a giant's strength; it was ill that he should use it in a giant's spirit. The problem of the seventeenth and eighteenth centuries was whether to dismember or harness Leviathan, and how to effect the process. The Americans preferred dismemberment of sovereignty and the separation of powers. England decided for unity of powers combined with responsibility for their exercise; it hitched a democratic wagon to *le roi soleil*.

The explanation of this choice is found in the history of

the English parliament. It inherited, but did not divide the sovereignty of the crown; or rather, there was no demise of powers at all, but a rearrangement of predominance in the partnership. The crown had never been sovereign by itself, for before the days of parliament there was no real sovereignty at all: sovereignty was only achieved by the energy of the crown in parliament, and the fruits of conquest were enjoyed in common. It was a happy thing that no English king ever delegated powers to an English parliament, but preserved them entire, so that in due time the people should enjoy them. For delegation would have meant division, and division would have meant subtraction. But since there was no delegation from the crown, there was no circumscription of the powers of parliament. It was summoned to do whatever might be proposed.

No doubt, in reality, and also in men's ideas of what was right, the competence of the crown in parliament was severely restricted; and possibly the obvious narrowness of those limitations dispensed with the need of definition. For we only limit powers which may conceivably be used or abused; it is but lately that men have begun to talk of sovereignty or property in the air, and we are not yet reduced to dealing by statute with property in sunshine or in rain. If Edward I had had James I's notions of sovereignty, he would have been more chary of summoning parliaments to share it with him; and if barons and churchmen had dreamt of the lengths to which the crown in parliament would go under the Tudors in dealing with their liberties, they would early have insisted on a written and rigid constitution. They did, in fact, try to stereotype Magna Carta, fortunately without success. But, on the whole, the poverty of parliamentary force enabled it to avoid definitions of its authority until the Tudors had discovered in parliament the aptest instrument for their designs. It was then too late for the threatened liberties to protest, for the crown in parliament was the interpreter of the extent of the powers it exercised; it was judge, jury, and criminal all combined, so far as its offences against fundamental law and medieval

liberties were concerned, and the political efficiency of combining a supreme court with a legislature has seldom been illustrated with more striking effect.

Nor was there ever a more signal proof of political genius or more fortunate coincidence of interests than that which led to the co-operation of crown and parliament under Henry VIII. The two were knit together in terms of the closest alliance in their conflict with rival jurisdictions, and each found its advantage in exalting, instead of in fighting, the other. The way in which parliament magnified Henry VIII is written in the statutes of the latter half of his reign; and the king repaid the compliment. "We," he declared to the commons, "be informed by our judges that we at no time stand so highly in our estate royal as in the time of parliament, wherein we as head and you as members are conjoined and knit together in one body politic, so as whatsoever offence or injury during that time is offered to the meanest member of the house is to be judged as done against our person and the whole court of parliament."[1] It was in his reign that the Speaker's claim for personal freedom of speech was expanded into a claim on behalf of every member,[2] and there is no instance in which Henry himself violated those privileges, respect for which he enforced upon others. Parliamentary sanction was sought to an unprecedented extent for the acts of the crown.

It was not the debasement, but the exaltation of parliament that impressed the witnesses of the process; and malcontents sneered at that "thirteenth article of our creed, added of late," that parliament cannot err,[3] a doctrine which even royalist judges admitted under Charles I.[4] Parliament, says Sir Thomas Smith, "representeth and hath the power of the whole realm . . . and the

[1] *Letters and Papers of Henry VIII*, vol. xvii. pp. iv, 107; Holinshed, *Chronicles*, iii. 956.
[2] *Lords' Journals*, i. 167; Hakewill, *Modus Tenendi Parl.*, p. 213; Manning, *Speakers*, p. 192.
[3] *Letters and Papers of Henry VIII*, vol. xxi. pp. ii. 345.
[4] Justice Berkeley on ship-money, Gardiner, *Select Documents*, ed. 1889, p. 54.

consent of parliament is taken to be every man's consent."[1] *L'État, c'est moi* was the boast which Voltaire put into the mouth of Louis XIV: in England the state was not the crown, but a fusion of all the estates, and every free Englishman could share in the glory reserved in France for the king. Sovereignty was vested, not in a single person, but in a composite and representative body, which expressed the national will and mind, and not merely that of a monarch. It was this national will that gave the Tudors their strength; it was a new will to be free from the old restraints, and it sprang from a disappearance of the medieval distrust in human rectitude and capacity, and from a growth in conscious control over national destinies. He knew not, Burghley was wont to say, what an act of parliament could not do in England;[2] and the long list which Sir Thomas Smith gives of the things which parliament could do and did, trespasses far and wide on the old forbidden domains of immutable law, and sets no bounds to the sphere of national legislation.

Not that the old landmarks of thought were suddenly swept away or submerged in one or two generations. They still survive in conservative affections, and iconoclasts themselves use the arms of the past to break with the past. Richard of York claimed in 1460 that hereditary right was part of the law of nature.[3] Henry VIII alleged the will of God and the law of nature as the two foundations of royal authority; and chief justice Coke tried to place man-made common law on a pedestal above the reach of king or parliament. That there was a law of nature, a law of nations, and a law of reason outside the scope of statute was a conception which lingered long in the judicial mind. Lord Mansfield laid it down that "the act of parliament 7 Anne c. 12 did not intend to alter, nor can alter, the law of nations." In the seventeenth and eighteenth centuries the courts often declared statutes null if against reason or

[1] *De Republica Anglorum*, ed. Alston, p. 49.
[2] McIlwain, *Political Works of James I*, p. 329.
[3] Fortescue, p. 207.

fundamental law;[1] and to-day, after all the labours of Austin, the church declines to recognize the ecclesiastical jurisdiction of the judicial committee of the privy council, which is based on parliamentary statute. It holds that the law of the church, which is thereby overridden, rests on a higher authority than any positive law of the state. This ground was common to all parties to the constitutional struggles of the seventeenth century—to crown and commons, peers and judges. All claimed to hold what they held by right. But they also held this in common, that they could override the rights of others by statute. The commons disposed of endless rights by statute and ordinance during the Long parliament; and crown, church, and lords employed statutes for similar ends at the Restoration. Parliament, which is not regarded by high churchmen as a sufficient authority for the jurisdiction of the privy council, was good enough for a Test act and a Clarendon code. Indefeasible right is, in fact, the right of oneself; and fundamental law is the law one invokes to restrain legislation by other people. As a minority dwindles, its attachment to fundamentals develops; but the more completely parliament represents the nation, and government grows responsible, the less does the nation demand restrictions on sovereign power. Fundamental laws and written constitutions are, in the main, expressions of the distrust which a people feels of its government or a government feels of its people.

So sovereignty has grown with popular representation and popular education.[2] The revolution of 1688 weakened the king, but strengthened the crown. The reform acts of the nineteenth and twentieth centuries enfranchised masses who used their votes to demand more and more governmental activity; and a cabinet has at its disposal to-day a wealth of resource and a profusion of powers beyond

[1] McIlwain, *The High Court of Parliament*, pp. 271, 281–3, 329.

[2] So modern is our "sovereignty" that it is not even mentioned in Cowell's *Law Dictionary*, and so different is its modern from its medieval meaning that we had early in the nineteenth century to adopt a variation of the word and use "suzerainty" to express what medieval writers meant by "sovereignty."

the wildest dreams of a Tudor or Stuart despot. The royal prerogative, so long feared and disliked, grows by leaps and bounds, for the advice of ministers has become the act of the crown, and ministers themselves the agents of the people. "The progress of constitutional liberty in this country," it was remarked long ago, "is shown not so much by the actual restraints that have been imposed upon the powers of the crown, as by the efforts which have been made to render the king's advisers responsible to parliament." [1]

Thus did England deal with the problem created by the monopoly of sovereignty and the decay of medieval restraints. Three alternatives were conceivable as means for preventing a monstrous tyranny. Sovereignty might be limited, it might be divided, or it might be kept intact but entrusted to ministers responsible to the nation for every detail of its exercise. Each of these expedients was tried in turn by England during the seventeenth century: experience taught it to prefer the third. Influenced perhaps by the short-lived experiments of the Commonwealth and Protectorate, but more by the exigencies of their own situation, and misled by the superficial appearance of the British constitution and by deductions therefrom by French philosophers, the Americans chose the second, and constructed a constitution on the basis of a divided sovereignty and on the dogma of the separation of powers. They believed that undivided sovereignty meant unbridled tyranny; and their descendants still maintain that the sovereignty of parliament is a doctrine inapplicable to the United States, and therefore to any free imperial community. The fiction that there is, or ever was a separation of powers in the English constitution, and the assumption that in that separation lies the sole guarantee for effective liberty, are based upon historical and other arguments which require further investigation.

[1] Nicolas, *Proc. of Privy Council*, vol. vi. Introd. p. cxl.

CHAPTER XII

THE SEPARATION OF POWERS

HOWEVER closely and completely an institution or a constitution may be studied by those familiar in practice with its working, there is always something further to be learnt by regarding it from a distant and external point of view, by examining the efforts made at imitation, and even by investigating intelligent misconceptions of its spirit and its working. No commentary on the British parliament is more illuminating than the constitution of the United States of America, and nothing helps to understand the sovereignty of parliament so clearly as the doctrine of the separation of powers. That doctrine was deduced by Montesquieu from his study of the English constitution in the first half of the eighteenth century; it was accepted as valid by Blackstone a generation later; and it was preached with unquestioning fervour and conviction by the authors of the American federal constitution and of the State constitutions in which that Union abounds. The division of the functions of government into legislative, executive, and judicial is indeed as old as Athens and Aristotle. But Montesquieu "was the first to demonstrate that the separation of governmental powers is indispensable to civil liberty"; [1] and the American constitution—"the greatest government God ever made," as it has been rashly called by an ex-president of the United States—was the first to be constructed on that principle. A few quotations will explain the meaning of the doctrine and the fundamental importance that has been attached to it.

[1] W. Bondy, *The Separation of Governmental Powers* (Columbia University), 1896, p. 13.

"When the legislative and executive powers are united in the same person or body," says Montesquieu, "there can be no liberty"; and again, "there is no liberty if the judicial power be not separated from the legislative and executive."[1] "Wherever," declares Blackstone, "the right of making and enforcing the law is vested in the same man, or in one and the same body of men, there can be no public liberty."[2] "I agree," echoed Alexander Hamilton, "that there is no liberty if the power of judging be not separated from the legislative and executive powers." Washington, in his farewell address, carried the argument a step further:[3] "the spirit of encroachment," he declared, "tends to consolidate the powers of all departments in one, and thus to create, whatever the form of government, a real despotism"; and the first constitution of Massachusetts, adopted in 1780, attempted to guard in perpetuity against the danger. "In the government of this commonwealth," it provides, "the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judiciary shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."[4]

This is a far cry from Fleta's *rex enim habet curiam suam in concilic suo in parliamentis suis;* and an Englishman who is not overwhelmed by this weight of testimony, who is not convinced that this drastic separation of powers has ever existed, or exists in England to-day, and yet is persuaded that his country is not quite a stranger to civil, religious, and political liberty, is tempted to put one or two preliminary questions. Firstly, if this separation of powers existed, as Montesquieu and Blackstone believed that it did exist, in England and her colonies in the first half of the eighteenth century, and if this separation of powers is so unique a guarantee of liberty and so sovereign a remedy

[1] *Esprit des Lois*, xi. c. 6.
[2] *Commentaries*, 5th ed., i. 146.
[3] Bondy, p. 17.
[4] *Ibid.*, p. 19.

against despotism, why was it necessary for the American people to issue a declaration of independence and resort to war in defence of their liberties and the rights of man? Secondly, why, after that demonstration of the inadequacy of the separation of powers to secure liberty, did the fathers of the American constitution adopt it as their palladium and enshrine it in the heart of their constitutional affections? Thirdly, why, after the unanimous acceptance and careful elaboration of the principle, was it necessary seventy-five years later to wage another and a still more terrible war to define and ensure that liberty so amply guarded by the constitution? And fourthly, what, after a century and more of "a government of laws and not of men," and after a double and triple assurance of liberty, is the exact point of a presidential campaign with "The New Freedom" as its war-cry? [1]

It is no part of my purpose to attempt an answer to any one of these questions. They are suggested merely in criticism of the confident assertion that liberty cannot exist without a separation of governmental powers, and of the optimistic assumption that with that separation liberty is secure; and they may perhaps help to reassure some of us in our belief in English liberty, of which we should otherwise be bereft. For assuredly there is no separation of powers in the British constitution, and Montesquieu was at fault alike in his observation and in the deductions he made therefrom. It was easy, indeed, to be misled on the point, and as a matter of fact he was only assuming as accomplished an ideal at which the house of commons deliberately aimed in the early part of the eighteenth century. It was the age of place bills; distrust of the crown was rampant since the days of the later Stuarts; and all connexion between the court and the commons was considered corrupting. Many attempts were therefore made to preserve the independence and purity of the legislature by excluding from it all servants of the crown,[2] and thus establishing a

[1] This was President Wilson's battle-cry in the election of 1912.

[2] The demand was put forward as early as 1536 in the Pilgrimage of Grace (*Letters and Papers of Henry VIII*, xi. 1143, 1244).

complete separation between the legislative and executive powers. Montesquieu's mistake lay in his failure to realize that the growth of the cabinet, the pivot of the modern British constitution, was already destroying that separation. It is more singular that Blackstone and the American lawyers should have adopted the misconception, though there was some excuse for failure to discern the responsibility of the executive to the legislature in George III's cabinets between 1763 and 1782.

The fundamental unity of governmental powers in England is apparent from the briefest survey of the constitution. It is not a mere form that all powers, executive, legislative, and judicial, are vested in the crown. Every item of legislation throughout the British empire is enacted by the king, in person or by deputy; "every single act of administration, from the arrest of a suspected criminal to the declaration of a war, is in express terms his act. The formula is carried out logically and minutely; his image and superscription appear on every coin, his monogram on every mailcart . . . he is every day plaintiff in a thousand suits and president of a hundred courts."[1] The capacities of the lord chancellor are almost as varied as those of the crown: he is the head of the judicature, he presides over one branch of the legislature, and he is an important member of the supreme executive. We have two supreme courts of appeal, the house of lords and the judicial committee; one of them is a branch of the legislature, the other a committee of the executive council. So far from there being a rigid separation between the legislature and the executive, there is the closest possible connexion. Textbooks say that the legislature controls the executive; publicists complain that the executive controls the legislature. The cabinet is part and parcel of the legislature; and but for the presence of ministers in the houses of lords and commons, parliament would be unable to discharge its constitutional functions.

The judicature stands more apart, but there is no separation of powers or even of persons. Judges are lords of

[1] *The British Empire*, ed. A. F. Pollard, 1909, pp. 169–70.

parliament, they are appointed by the executive, and they can be removed on an address from both houses of parliament. Parliament itself is a court, and discharges judicial functions. In private bill legislation, a committee of either house can hear counsel on both sides and summon and cross-examine witnesses. Each house has its bar, to which petitioners and offenders may be called. Parliament can pass acts supplementary to, or overriding the verdicts of lower courts. It has passed hundreds of acts granting divorce which could not be obtained from the courts; and by acts of attainder and impeachments has brought many a head to the scaffold. Such methods may not recommend the fusion of powers to transatlantic critics; but at the worst they bear comparison with the presidential assassinations and lynching of negroes which have darkened the abodes of purer democracy. More important are the facts that parliament defines and determines the law and the justice which the courts administer, and that no judge can dispute the legality of an act of parliament. Nor had parliament to wait on the bench before it could levy an income-tax, legalize trade unions, or abolish trusts.

This absence of delimitation is the natural characteristic of a constitution that has grown, and not been concocted. The separation of powers in politics corresponds to the fixity of species in natural science; and both ignore evolution. But the history of parliament is mainly concerned with the evolution of institutions from a common protoplasm and with their mutual struggles for recognition and predominance. The influence of common origin pervades every branch of English government, and behind all its specific functions there lies a fundamental unity symbolized by the crown. But there has been specialization and differentiation, for every organism which fails to specialize becomes inefficient; and we have firstly to trace the differentiation which gave colour to Montesquieu's fancied separation; secondly, to indicate the limits which made his interpretation fiction and not fact; and thirdly, to inquire how far these limitations involved the disastrous results

which seemed so patent to the founders of the American constitution.

We revert to Fleta's description of parliaments, and find that his conception of a composite body consisting of court, council, and parliament is amply borne out by the records. Doubtless the executive was the earliest and the most prominent of the composite functions of government; war begat the king, and his first duty was execution. There was little scope for "judgement" in primitive law, and less for legislation under the rule of primitive custom. What judgement and legislation there was, was passed by the king, and it was only by a slow process of differentiation that he partially divested himself of the personal exercise of these functions. The Norman and Angevin rulers judged and legislated as well as administered, and even under Edward I there was no clear discrimination. When the king holds his court in his council in parliaments, he can clearly do anything; but it is also clear that the king in council can legislate without the assistance of parliament. Most of Edward's legislation was promulgated before the days of his Model Parliament. Even such separation of powers as may be implied in the requirement of the assent of lords and commons to legislation has never been completely effected, and in 1872 the crown, in abolishing by an order in council the purchase of army commissions, carried a measure which had failed to pass the legislature.

The consent of a council to legislation was, no doubt, secured in practice at an early date, and probably Edward I's council assented to all his enactments. But, in the first place, the power of the council to veto legislation has never been formally admitted; its constitutional function was merely to advise, and it is no part of the law of the constitution that the crown must take the advice of its council. The secrecy which has always enveloped the deliberations of the executive in England precludes any accurate knowledge of the extent to which English kings have overruled, or been overruled by, their councils; and down to the reign of George III it is often impossible to determine how far

the policy of the executive was that of the king or his ministers. Secondly, a council is primarily part of the executive, and proof of its fullest control over legislation would not establish any separation of powers.

The presence of the king's council in parliament, and the extent of its identity with the lords of parliament, render it well-nigh impossible to distinguish in the middle ages between the assent of the council to legislation and the assent of a second chamber; and for indications of any clear distinction between executive and legislative functions we have rather to look to the relations between the crown and the commons, who were no part of the council. The matter is complicated by taxation. Apart from the regular feudal aids and tallages, which were regarded as rent rather than taxes, and therefore required no consent for their exaction, there was never any idea that the crown could tax its subjects without their consent; and taxes were considered as voluntary grants made to the king by the estates in parliament. Not until towards the close of the middle ages did taxation take even the form of legislation;[1] and the grant of taxation is only germane to the separation of powers in so far as the control of supplies enabled the commons to assert an influence over legislation.

The claim of the commons to a voice in legislation is supposed to have been finally established by the statute of York in 1322.[2] It is probably nearer the truth to say that the claim was then first advanced; and before we can accept even this modified version, various qualifications have to be made. Firstly, if the claim extended to all legislation, centuries elapsed before it was completely admitted, and there is at least plausibility in the contention that it was only understood to apply to what would be called to-day constitutional changes or alterations of fundamental law, leaving the king in council still free to legislate in ordinary

[1] The earlier grants were made in the form of an indenture; and even when we come to "acts for a tenth," etc., they often contain indentures.

[2] *Statutes of the Realm*, i. 189; *Report on the Dignity of a Peer*, i. 282–3; Hallam, *Middle Ages*, ed. 1878, iii. 233; Stubbs, *Const. Hist.*, ed. 1887, ii. 369, 628.

matters by means of ordinances.[1] Magna Carta, the *Confirmatio Cartarum*, and the *Articuli super Cartas*, were undoubtedly regarded as fundamental law; and the commons, in asserting a voice in legislation, would naturally begin with the more obvious, moderate, and conservative claim, instead of with a sweeping radical pretension. But, further, it must be remembered that "the commonalty of the realm," on whose behalf the claim is made, is a phrase of very vague meaning. It may or may not include the city and borough representatives; it may or may not exclude the clerical proctors, but it cannot safely be identified with the still undeveloped house of commons.[2] It is quite possible, moreover, that the real emphasis of the statute is not upon "commonalty" at all, but upon the phrase "in parliaments"; and on this interpretation the statute was better observed than on any other. Its meaning would then be that matters of state were to be determined in parliaments, and not in great councils, albeit great councils sometimes contained representatives of cities and boroughs as well as prelates, earls, barons, and knights, and continued to be summoned throughout the middle ages. There was certainly a well-recognized distinction between the functions of parliaments and great councils, though the subject has received comparatively little attention.[3] Finally the mere silence of a public meeting, such as the assembly of estates was before the organization of the house of commons, would be taken as giving consent. No real consent, and therefore no approach to a distinct share in legislation, can be claimed for the commons until it is expressed in documentary forms.

Ten years later, however, we have in the records of the parliament of March 1332, the definite statement that certain measures "ordained" by the earls, barons, and

[1] G. T. Lapsley in *Engl. Hist. Rev.* xxviii. 118–24; Tout, *Reign of Edward II*, pp. 150–1.

[2] "Whenever you meet that word 'commonalty' in ancient proceedings, you must translate it a community not the commons" (Palgrave in *Rep. on Public Petitions*, 1833, xii. 21).

[3] See below, Chap. xiv.

other magnates were read before them, the king, the knights of the shires, and the *gentz du commun*, were found pleasing to them all, and were fully agreed to.[1] Further progress is marked in 1340, when twelve knights of the shire and six borough members were added to a committee of prelates, earls, and barons to try and examine certain petitions *et de les mettre en estatut*.[2] In 1343 there is fuller evidence of the activity of the commons: not only is their advice asked, and articles drafted by the lords submitted for their consent, but they add provisions of their own, and the ensuing statutes are said to have been "ordained" by *la commune* as well as by the king and the peers.[3] These proceedings imply the existence of that machinery for deliberation and the expression of opinion without which consent was the merest form; but they do not imply any recognition of the claim that the assent of the commons was indispensable to legislation, and in spite of the repeal of the 1382 statute against heretic preachers,[4] there remained a sphere of ecclesiastical legislation which the commons did not dispute.

The distinction between statute and ordinance continued obscure till the sixteenth century;[5] and the province of proclamations was contested into the seventeenth. Sir Thomas Smith, no despiser of parliaments, tells us that "the prince useth to dispense with laws made"; and even the Whigs, at the revolution of 1688, while abolishing the suspending power, only abolished the power of dispensation "as it hath been exercised of late." There were famous orders in council during the Napoleonic wars; and if it had not been possible in 1906–7 to legislate by similar means, the Transvaal and Orange River colonies might not have received responsible government yet. Over vast areas within the British empire the crown can legislate without the sanction of parliament; nowhere can parliament legislate without the sanction of the crown; no important measure

[1] *Rot. Parl.*, ii. 65.
[2] *Ibid.*, ii. 135–9.
[3] *Ibid.*, ii. 113.
[4] See above, p. 210.
[5] Cf. *Rot. Parl.*, ii. 12; Nicolas, *Proc. of Privy Council*, vol. iii. pp. vi, 22; Stubbs, ii. 426–7.

can pass without the goodwill of the executive cabinet; and legislation by means of departmental regulation tends to increase. From the top to the bottom of our constitution, from the privy council down to county councils, borough councils, district councils, and parish councils, every administrative body possesses, within limits laid down by the law, legislative powers as well. The notion that the executive "should never exercise the legislative and judicial powers or either of them" is one which could only commend itself to an unsophisticated community with the simple conceptions of the first constitution of Massachusetts. So far from the separation of powers being a constitutional dogma in the British empire, it is regarded as almost unconstitutional—and in the Australian Commonwealth it is positively illegal—for an executive minister to be long without a seat in one or other branch of the legislature. The crown has dissociated itself from no powers and no functions of government whatsoever: it has associated with itself in the exercise of those powers an ever-widening circle of popular representation, and every extension of that circle has added to the strength and unity of the will expressed by the crown.

Imperfect and superficial as has been the separation between the executive and legislative powers, the divorce between the executive and the judicature has hardly been more complete. Between council and *curia* a distinction is barely discoverable in the reign of Edward I. The judges are all members of the council; the supreme arbiter of differences between the lower courts is a common session in council in parliament; and it is to the council that petitions in parliament against judicial abuses are referred. It is true that from the days of Henry II certain members of the council are assigned for specific judicial purposes, and that their specialized functions crystallize into the three courts of common law, king's bench, exchequer, and common pleas; but it was long before the idea of "once a judge, always a judge" obtained. Judges of the common law courts were often employed in executive

functions, and the temporary "assignment" of commissions of knights and others for judicial purposes was of constant occurrence; even to-day there is no fixed line between judicial and other functions, and laymen are often employed in judicial inquiries. We are told, indeed, that about 1345 the judges of the three courts cease to be sworn of the council.[1] But in Richard II's reign they are still assessors or advisers of the council for legal purposes, and parliament insists on their presence in the council on these occasions. Late in the reign of Henry VI they are still in attendance, though they protest that they are of the council for matters of law and not of politics.[2] In Tudor times the two chief justices were commonly members of the privy council, and down to the present day all law lords and lords justices of appeal are sworn privy councillors, while a committee of the council exercises the functions of a supreme court of appeal for vast areas of jurisdiction. If one of our two supreme courts of appeal is a branch of the legislature, the other is a committee of the executive council.

Moreover, the abandonment of the council by the common law judges did not in the least involve a separation between the judicial and executive functions of the council. It simply emphasized the abandonment to the council of all jurisdiction which could not be brought within the narrowing and hardening frontiers of the common law, a process to which the need for Tudor despotism has ingeniously been attributed.[3] For it left enormous and growing fields of jurisdiction unprovided with any judge except the council and its offshoots. Equity was thus left to the executive; chancery was the king's council in chancery,[4] the star chamber was its sessions for dealing with over-mighty subjects, the court of requests its sessions for hearing poor men's complaints, and the councils of the North and of Wales were its provincial delegacies. Nor was it only in

[1] Baldwin, *King's Council in the Middle Ages*, p. 76.
[2] *Ibid.*, pp. 205; cf. Nicolas, *Proc. of Privy Council*, i. 76, ii. 304, iii. 112, 132, 151, 313; the council still remained a *curia*.
[3] Cf. Nicolas, i. 297–8.
[4] Baldwin, pp. 241–2; Nicolas, iii. 36.

the sphere of central government that administrative and judicial functions were combined. The union is still more marked in the activities of the justices of the peace. They administered the statutes of labourers and apprentices, the vagrancy acts and the poor law; and they acted also in petty and quarter sessions in a judicial capacity. In spite of a multiplicity of local government acts, this combination continues to this day, and to enforce a separation of powers we should have to send to the scrap-heap our whole system of magistracy. We should also have to break up our courts-martial, our consular courts, and our ecclesiastical courts, in all of which executive officers act judicial parts. The affairs of the British empire cannot be managed on the lines of the original constitution of Massachusetts; and the doctrine of the separation of powers was an ingenuous attempt to reduce the infinite complexity of human government to the sublime simplicity of a constitutional rule of three.

So far we have been dealing with the retention by the executive of legislative and judicial functions. A similar refusal to obey the rules of abstract political science is seen in the retention by the legislature of its hold over the executive and judicial powers, and in the retention by the judicature of no slight power of making law. In the days of Edward I and his immediate successors, when parliaments met three times a year, a good deal of administrative work was discussed and done in parliaments, and the "Rolls" contain pages of details which read exactly like the later "Acts of the Privy Council." But the expansion and popularization of parliament, and its development into estates and houses, made it less and less suitable for the transaction of administrative business. This was withdrawn more and more from the cognizance of the king's council in parliament to that of the king's council out of parliament, and the council itself became less a *magnum consilium* and more a *consilium privatum, secretum,* or *continuum.* But the council remained an integral part of the legislature; the lord chancellor presided in the parliament chamber,

whether he was a peer or not, and secretaries of state were given by statute in 1539 official seats on the woolsacks. The presence of privy councillors in parliament was not a Tudor novelty introduced to influence its decisions, but a practice handed down from the reign of Edward I; the novelty consisted in their presence in the house of commons rather than in the parliament chamber, and illustrates the growing importance of the commons rather than the servility of the electors. They were then, as they are now, the means through which the wishes of the legislature were impressed, if not imposed, upon the crown.

This link between the executive and legislature was never, in spite of place bills, broken; and the more the actual details of administration were withdrawn from parliament, the more it began to insist upon the general responsibility of ministers. Impeachments and acts of attainder kept the principle alive from the reign of Edward III to the Revolution, when more refined and effective methods for achieving that end were devised in the practices of voting supplies and legalizing the maintenance of the army and navy for one year only at a time, and of refusing the means of carrying on government to ministers of whom the commons did not approve. The control of the executive by the legislature is not laid down as a principle in any law of the constitution; it is none the less the essence of the constitution, and it is a contradiction in terms to attribute a separation of governmental powers to a constitution the essence of which consists in the control of one by the other.

The connexion between legislature and judicature has throughout English history remained no less intimate. Parliaments began in a court of law: their original functions, indeed, seem to be hardly distinguishable from those of the later chancery; their forms of proceeding by writs, bills, and petitions were identical, and in many minute details they still preserve evidence of their common origin. To devise new remedies for new wrongs, to hear and determine pleas that had been delayed or about which the judges

differed, were the oft-enunciated purposes of parliaments. The core of every parliament was a session of judges in council, and the earliest pictorial representation of the parliament chamber shows that its inmost circle consisted of four woolsacks arranged *vis-à-vis* to facilitate intimate confabulation. On the upper woolsack sits the chancellor, on the sacks to his right and left the justices of the king's bench and of common pleas, and the master of the rolls, and opposite him the masters in chancery. Behind the judges there sit, in outer rings, the bishops and abbots to the right and the temporal peers to the left; and below the bar, opposite the chancellor, stand the Speaker and the commons; and all these elements represent the legislative accretion on the judicial core. No assembly organized from the beginning as a legislative body would have assumed the configuration of the parliament chamber.

The distinction between judicature and legislation goes back, however, a long way; and its earliest traces may perhaps be found in the distinction made in chancery between judicial and original writs. The former might issue as matters "of course," *de cursu*, but "the granting of specially-worded writs was regarded as an important matter, which required grave counsel and consideration . . . it was no judicial act."[1] In time it was thought that only a parliament could devise new remedies and ordain new forms of procedure, that is to say, that only parliament could legislate. This, however, was a limitation of chancery and not of parliament, and there was no suggestion that delays and abuses arising out of common litigation could not be redressed by bills and petitions in parliament. The gradual loss of judicial business by parliament was due to its political development,[2] to the growing rarity of its sessions compared with the permanence of the council and chancery, and to the development of "common" petitions as a means of dealing with grievances which were most

[1] Maitland, *Collected Papers*, ii. 122–3; Pike, *Const. Hist. of House of Lords*, p. 296.
[2] See above, pp. 128–31.

widely felt and enlisted the greatest support. But even when individual petitions come to be habitually referred to the council and chancery, the answers are given *per auctoritatem parliamenti*, and continue for a while to be entered on the "Rolls."[1] It is an instance of delegation of functions, not of separation of powers. The legislature long retained in its hands the power of punishing state offenders by means of impeachment and acts of attainder, or, in other words, of dealing judicially with persons whose influence might render them immune from lower courts or whose offences could not easily be brought within the four corners of the common law. It also retains judicial authority over its own precincts, members, and servants. Even the claim of the commons to hear the evidence against Thomas Seymour in 1549 and their condemnation of Floyd in 1621 were based upon precedent,[2] and represent attempts to retain a share in the common inheritance of parliament, and not a spirit of radical innovation. In the same way, the reference of individual petitions to courts of law did not preclude the passing of private acts of parliament to grant relief or impose disabilities where other means might fail: down to 1857 an act of parliament was the only means of annulling a valid marriage. It is to the house of lords that appeal lies from the civil courts in the British Isles, and the distinction between the house of lords as a legislative chamber and the house as a court of appeal is merely one of practice, and is no part of the law of the constitution. Finally, while parliament will rarely, if ever, intervene nowadays to reverse a judicial decision, it will and does intervene to reverse the principles upon which that decision has been based; and by passing acts of indemnity it can bar judicial action in multitudes of cases in which the logic of common law would inflict intolerable injustice.

The withdrawal of the judicature from executive functions

[1] Nicolas, *Proc. of Privy Council*, i. 73, ii. 307, 309, v. p. xi; Leadam, *Star Chamber*, i. pp. xxiii–xxiv; see above, p. 128.
[2] See below, p. 309, *n.* 2.

has been a more comprehensive, but still a gradual and an incomplete process. The prerogative courts of the Tudor period were councils as well; and the justices of the peace did most of the work of local government till late in the nineteenth century. A lord chief justice sat in the cabinet as late as the same century, and the lord chancellor continues to do so to-day. Lords justices were frequently appointed to govern England during the reigns of William III, and even the first two Georges, when the king was abroad,[1] and lords justices have governed Ireland for considerable periods of its history. Judges have acted as colonial governors in all parts of the British empire, and some of the greatest founders of New England, like Bradford and Winthrop, combined in their persons the supreme judicial and executive functions, without presumably entailing upon those colonies the deplorable consequences deduced from the combination by the framers of the constitution of Massachusetts. It was, however, to the government of men that those logicians seem to have had the greatest objection.

Their boldest effort was to deprive the judicature of all control over legislation. In England, as we have seen, the judges practically made the laws in the middle ages, and a chief justice alleged the fact in court to support his understanding of a statute. Baronial jealousy, however, which insisted that judges were mere ministers of the crown and could not be peers, succeeded by Richard II's reign in reducing their status in the high court of parliament to that of mere advisers without a vote; and in 1586, when they fell foul of the privilege claimed by the commons over the Norfolk election case, that house, too, resolved that "though the lord chancellor and judges were competent judges in their proper courts, yet they were not in parliament."[2] It is not unlikely that this limitation applied originally only to that function of the judicature about which the barons were most sensitive, namely, the trial of peers.

[1] See Prof. E. R. Turner in *Engl. Hist. Rev.*, xxix. 5453–76.
[2] Prothero, *Select Documents*, p. 130.

But the statute of 1539 clearly states that no one under the degree of a baron, although he were lord chancellor, lord treasurer, lord privy seal, lord president of the king's council or chief secretary, and sat in the parliament chamber in virtue of his office, "could have any interest to give any assent or dissent in the said house."[1] The anomaly of having a lord chancellor to preside over a house in which he "had no interest to give any assent or dissent" was gradually removed by the practice of creating the lord chancellor a peer, though the rule did not become invariable until after the reign of Queen Anne. The cause of the anomaly by which judges sat in a house in which they had no votes was the removal of the business for which their presence was primarily required, to another sphere. "In proportion as this channel enlarged, *i. e.* direct access of petitioners to the council, chancery, etc., instead of *via* parliament, the number of parliamentary petitions decreased. Equity continued to gain rapidly upon parliament, and about the time of Edward IV, when equity was fully established, the remedial jurisdiction of parliament wholly ceased, and it does not appear to have been revived to any extent until the time of James I."[2] The lords recovered their jurisdiction after the fall of the prerogative system under the Stuarts; and the anomaly of judges sitting in a house which dealt with no judicial business was subsequently eclipsed by the anomaly of an assembly of hereditary peers exercising a supreme appellate jurisdiction independently, or even in defiance of, their judicial advisers.[3]

But the denial of votes to the judges in the house of lords did not dispose of their influence over legislation. It has been claimed by a lawyer that in the fifteenth century "the class legislation of parliament was defeated by the national

[1] 31 Henry VIII, c. 10.

[2] Palgrave, *Report on Public Petitions* (Parl. Papers), 1833, xii. 19; McIlwain, p. 133; Maitland, *Memoranda*, p. xxxiii. Palgrave's statement probably requires a good deal of qualification; it may be due to the fact that parliamentary petitions for the period are not in the Record Office, but at Westminster.

[3] The decision of the house of lords on the right of the crown to create life peers was taken in opposition to the advice of the judges.

legislation of the judges";[1] and Coke points out that the judicial decision in Taltarum or Talcarne's case effected a reform which had been often rejected in parliament. The year books of Henry VII contain ample evidence that before legislation was introduced into either house its principles were discussed and settled by the judges in common session. Thus they laid down the principle of Poynings' law nine years before it was enacted; they defined the law of attainder before bills were introduced to give it effect; and they decided that an act was not valid unless passed by the house of commons.[2] Statutes, indeed, were still regarded as measures to give effect to the law as interpreted by the judges. Bacon's encomium on the practice of frequent consultation between the crown and the judges was suggested by his historical reading; and James I's predilection for it was no constitutional innovation. It can only be regarded as unconstitutional in the light of *ex post facto* generalizations from later constitutional practice. The practice admired by Bacon was no doubt objectionable from the democratic point of view, because it made the judges the final arbiters of the liberties and laws of the English people so long as parliament could be muzzled or suppressed. But the remedy did not lie in increasing the separation of powers. Judges make a great deal of law to-day: they do so even in the United States, in spite of the paper guarantees of "a government of laws and not of men."

The truth is, that human affairs cannot be cut up into mathematical portions and confined in logical categories. The separation of powers is a will o' the wisp, and the rigid restriction on paper of the United States judicature to strictly judicial functions has, in point of fact, enabled it to determine all sorts of political, executive, and legislative questions. A legislative veto is a legislative power, and the veto of the supreme court on American legislation has

[1] Mr. (now Justice) Scrutton, *The Land in Fetters*, p. 76.

[2] My *Reign of Henry VII*, ii. 10–11, 19, iii. 292–4; Vinogradoff, "Constitutional History and the Year-Books" in *Law Quarterly Review*, xxix. 1–12; McIlwain, p. 325.

been as effective as ever was the royal veto in England. Without the leave of the judicature no trade could be defined by the legislature as a dangerous occupation, no limit could be set to hours of labour, no restraint imposed on the conditions of employment, no measure taken to further social reform, because such measures always involve some restraint on somebody's liberty or property, and according to the constitution no such restraint could be imposed "without due process of law," by which is meant, not due legislation, but judicial procedure. In the United States the solution of the problems of social reform depends more upon the judicature than upon the legislature. By declaring an income-tax unconstitutional the supreme court compelled the legislature to devise other forms of taxation until the constitution was amended; and it thus controlled taxation as well as legislation; for a particular course of action can always be dictated by the authority which can veto all alternatives.

Nor does the separation of powers prevent that arbitrary exercise of them, which the framers of the American constitution dreaded so intensely. It is rather thereby facilitated, for within its sphere each authority is irresponsible and unchecked; and each department is, under the constitution, the final and exclusive judge of its own competence. Each of the powers of government in the United States has greater opportunities for arbitrary action than in England. Every legislative body is, for instance, the arbiter of the validity of its own elections, a system that produced many scandals in England until it was abolished by reference to the judges. Within the executive sphere the president can do what he likes for his prescribed four years; no popular agitation, no vote of censure by the legislature can drive him from office, and the only practical means of removal is assassination. He can, indeed, be impeached, but only for crime and not for his policy. Nothing, too, can dissolve the legislature before its term is finished, and neither legislature nor executive can correct an interpretation of the law by the supreme court, however violent or opposed to the public

conscience it may be. There is a total absence of that mutual responsibility and control which has proved a far better safeguard of liberty in England than has the separation of powers in the United States.

Here, the legislature can turn out the executive or the executive dissolve the legislature at almost any moment in response to a national outcry. Either can force an appeal to the people, on this condition, that it is willing itself to submit to the same arbitrament. There is nothing sacrosanct or fixed about the cabinet's tenure of office or the duration of parliament; a parliament may be dissolved at a premier's nod, and a cabinet will not last a month unless it possesses the confidence of the legislature. Its conduct of affairs is reviewed in the legislature day by day by means of questions and answers, and, if necessary, by motions for adjournment or of want of confidence. Even the judicature is not exempt from responsibility; it is true that judges are seldom removed by the formal means of an address of both houses of parliament, but informal hints that such might be necessary are not so rare, and are as a rule effective. A more salutary check on judicial extravagance is the knowledge that decisions like some of those pronounced by supreme courts in America would precipitate acts of parliament preventing their repetition.

This system of mutual responsibility is at once the effect and the cause of confidence, which is the basis of the constitution of the British empire. The keynote of the American constitution was, on the other hand, distrust—distrust of the government and also distrust of the people. The fundamental assumption was that every man is by nature not free, but a tyrant. "It is," declared John Adams, "by balancing each of these three powers against the other two that the efforts in human nature toward tyranny can alone be checked and restrained, and any degree of freedom preserved." [1] They were not to co-operate for the production of good, but to counterwork one another for the prevention of evil. It was assumed that each would do wrong unless

[1] Quoted in Bondy, p. 17.

it was checked; and the people could not be trusted to check them. Congress cannot force an appeal to the people against an obstinate president, nor the president against an obstructive congress.[1] The president's term was fixed, and re-election discouraged, lest he should by long tenure of office so corrupt the electorate, or create by means of the system of spoils so powerful a party machine that he would become dictator and the electors helpless. He was to be prevented from governing badly, and not encouraged by governing well to look forward to a renewal of the nation's confidence. Indeed, the people were not to elect him at all, but a college of prudent men better fitted to choose a ruler for the people than the people themselves. The idea of a people finding its ablest men and trusting them so long as they are able and willing to serve it, still seems foreign to the United States, and the framers of the constitution did their best to hamper the process and harness the popular will. Theirs was the age of paternal despots, but rarely has paternal despotism laid its dead hand on the future with greater effect than in the rigid conditions of government which the United States constitution imposed on four generations of freemen.

This fundamental distrust, expressed in the separation of powers, explains the reason why American efficiency, so marked in private concerns, has been so fettered in government. The constitution was framed under the dominance of the old popular prejudice that there must always be a fundamental antagonism between the interests and instincts of the government and those of the governed. No one could really be trusted with the exercise of sovereign power. It was therefore put under the lock and key of a rigid and written constitution, and such powers as were permitted exercise were divided. Thus the American legislator attempts to legislate without the co-operation and advice of the expert in administration, and the administration is isolated from the wholesome influence derived from daily contact with a popularly elected congress. The expert,

[1] Written in 1914.

indeed, is reserved for private adventures and not for the public service; and conditions which no American would tolerate in his private business are regarded with equanimity in the affairs of the nation. The civil servants of the state are treated as no individual would treat those on whose service he relies. Ambassadors are relegated to private life at every change of government; they are paid on such a beggarly scale that wealth, and not capacity is the first requisite for a diplomatist; and even a secretary of state has been driven to eke out subsistence by lecturing tours. The public conscience is indifferent to these details, because the public believes in private enterprise, but does not realize the claims of efficient national government. The separation of powers is an expression of this distrust and indifference, and helps to explain why American politics are unattractive to so many American minds.

There were good reasons for the adoption of that principle in the eighteenth century, but those reasons are passing away. Distrust of sovereignty was the natural product of centuries during which it had been exercised in the interests of the sovereign and not in those of the people; and confidence grows slowly in a people with few communications. The previous independence of one another enjoyed by the thirteen colonies, and the vast extent over which their scattered and heterogeneous population was spread, engendered distrust of a common sovereignty. Subsequent extensions of territory and the mighty influx of alien immigrants with no ideas in common delayed the consolidation to be expected from the development of communications, the filling up of vacant territory, and the pressure of external forces. The alien immigrant still provides the "boss" with the raw material for his machine-made politics, and feeds the public distrust of a government subject to such manipulation. When the "hyphenated" American disappears, the "hyphenated" system of government by separation of powers will go with it; and an American nation will trust a national government with the full powers of sovereignty.

The separation of powers will then be reduced to its true proportions as a specialization of functions. That has been the limit of differentiation in English government. Executive, legislature, and judicature have been evolved from a common origin, and have adapted themselves to specific purposes, because without that specialization of functions English government would have remained rudimentary and inefficient. But there has been no division of sovereignty and no separation of powers. The head cannot do the work of the heart, nor the hand that of the foot; but that is no reason for disconnecting them one from the other, and endowing each with a will of its own. Above all we need a brain and a conscience to move every limb at will and without the abnormal exertion of recourse to the cumbrous machinery of reconstitution. We need not dissolve our unity of will in a trinity of powers; and that unity of will is expressed by the crown in parliament.

CHAPTER XIII

THE CROWN IN PARLIAMENT

THE establishment of sovereignty in parliament secured unity of power, but did not determine its distribution among the various elements which made up that composite body; and the forms of the constitution were equally compatible with monarchy, aristocracy, or democracy. Whichever element prevailed would have national sovereignty at its disposal, but there was no clear indication which that element would be. Each of the factors in parliament, crown, lords, and commons, has claimed at different times a predominant share in the partnership; and from the end of the Tudor harmony to the passing of the parliament act in 1911 the struggles between them have filled many pages of constitutional history. The crown was clearly the effective factor in parliament under Edward I, and with considerable fluctuations it retained its predominance until the Stuart period. That predominance was, however, disputed by the lords, whose constitutional influence was exerted in the middle ages by means of the council in parliament, and in modern times by means of the peers in parliament. The reform bill of 1832 initiated the predominance of the commons in parliament which was completed by the parliament act of 1911. Nevertheless, the fundamental difference between the evolutionary growth of the British constitution and the revolutionary creation of other systems consists largely in the fact that the crown was never expelled from parliament, and remains an essential factor in its organization. Parliament may hold the crown in solution, but the crown is not dissolved.

The conception of crown and parliament as two distinct entities confuses the interpretation of much of our con-

stitutional history. It arose in the Civil War, and was perpetuated by the eighteenth-century dogma of the separation of powers which was stereotyped in American constitutions. But it was always a fundamental misconception of the English constitution; it tends to falsify history and to render unintelligible the actual working of the constitution of the empire. The problem for the constitutional historian is not to discriminate between the powers of the crown and those of parliament, but between the things the crown could do in council and the things which it could only do in parliament. The powers of the "crown in parliament" have never been defined, and they have no constitutional limits. The "crown in parliament" wields a sovereignty which legally and constitutionally is absolute; and the separation of crown and parliament is a dichotomy which divides the indivisible, and promotes the cause of anarchy.

There had, indeed, been a real separation of powers in the middle ages between *regnum* and *sacerdotium*, and none save a few extremists denied that each had an independent jurisdiction. Edward I often in parliament refused to trench upon the sphere of the ecclesiastical courts,[1] and he gave that sphere an elastic interpretation in his writ *circumspecte agatis*. On the eve of the Reformation the king's judges denied that an act of parliament could make the king an ecclesiastical person,[2] and parliament itself, in the reign of Henry VII, was chary in restricting the enormous liberties of clerical criminals. It was this well-nigh universal recognition of a supreme ecclesiastical jurisdiction that was repudiated by the act of supremacy against the will of the catholic church and without the consent of nine-tenths of its provinces. The revolution was, however, successful, and its effect was to establish the absolutism of the "crown in parliament," which is a very different thing from the supremacy of the crown over parliament.

The problem, therefore, is not to define the unlimited and

[1] Cf. *Rot. Parl.*, i. 3, 42, 46.

[2] McIlwain, pp. 277–9. If he was a semi-ecclesiastical person, he was made so by the ecclesiastical unction he received at coronation and not by any Act of Parliament.

undivided authority of the "crown in parliament," but to trace, firstly, the limitations of the "crown in council," and, secondly, the shifting weight of the various elements in that composite entity the "crown in council in parliament." The restriction of the powers of the "crown in council" was effected by parliamentary legislation; and it was possible to limit the "crown in council" by that method, because from the time of Edward I onwards the "crown in council in parliament" had admittedly enjoyed fuller powers than the "crown in council." It had long been possible to appeal from the king in person to the king in sober council, by writ of error from *coram rege* to the king in parliament; and in repeated great councils it had been held that only in parliament could questions of peace or war be decided.[1] The delimitation of the powers of the various elements in the "crown in council in parliament" could not, on the other hand, be easily achieved by parliamentary legislation, because crown, lords, and commons each possessed, since the fifteenth century, an absolute veto over the resolutions of the others. Hence the great changes in this sphere were accomplished by open force in the Civil War and at the revolution of 1688, and by veiled coercion in 1832 and 1911. Similarly it was not by legislation, but through decay of power that the crown lost its veto, and the lords their hold on finance and administration.

The problem of the crown in council does not fall within the scope of this essay except in so far as concerns its relations with parliament. Its domestic history has been treated in a number of admirable monographs, whose main defect is that they leave on one side the position of the council in parliament and its relations with the council out of parliament.[2] It is with the former that we shall have to deal; but

[1] Nicolas, *Proc. of Privy Council*, vol. i. pp. xxxviii, 144. It was a stipulation of the treaty of Étaples in 1492, following the precedent of Troyes in 1420, that it should be confirmed by the three estates of the two realms (2 Henry VII, c. 65). Cf. *Cottoni Posthuma*, pp. 13–39, and Vernon-Harcourt, *His Grace the Steward*, p. 248. For detailed proceedings on writs of error in parliament cf. *Rot. Parl.*, iv. 18, 411–13.

[2] See Baldwin, *The King's Council*, 1914. Cf. Nicolas, iv. 185–6, and *Rot. Parl.* iv. 424*b*, for references to "the king's great council in parliament" and the king's "council out of parliament."

inasmuch as the council—whether in parliament or not—was subordinate to the crown, it will be convenient to discuss first the position of the crown in parliament.

The throne, which the lords have sought to exclude from their house, is more than a bare symbol; for the crown in parliament is a real presence, which did not cease to be real when it ceased to be corporal. Down to the middle of the seventeenth century no one visualized, and no artist depicted parliament without the king enthroned in the midst thereof. In the reflex light of later history Henry VIII's presence in parliament has been regarded as exceptional intervention with a view to interference with its liberties. But time had been when the royal presence was the rule and not the exception; in the sixteenth century the throne in the parliament chamber was not intended to be empty; and its vacancy to-day does not indicate that the king has no right to be present, but that the lords have reduced that right to an empty form.[1] The crown is, indeed, the core out of which the rest of parliament has grown; for the crown expanded into the "crown in council," and then into the "crown in council in parliament." Constitutional theory thus represents historical fact. Historians a generation ago were wont to trace in Anglo-Saxon localism the original liberties of the English constitution, and liked to dwell upon its analogies with the equally local and primitive liberties of Uri and Schwyz. It is significant that the same historians admired federal government, and saw in the constitution of the United States a true reflection of English constitutional principles. That there were germs in common is obvious; but the differences are fundamental. The English constitution has always been unitary; those of Switzerland and the

[1] The minority of Edward VI, followed by the reign of two queens, contributed as much towards the sovereign's absence from parliament as the reign of Queen Anne, followed by those of two Germans, did to a similar absence from the privy council. The parliament chamber, of course, must not be confused with the house of commons. The commons protested in 1523 against Wolsey's presence as infringing their liberties; and, while the commons often visited Henry VIII—and, indeed, insisted upon their right of access—it is doubtful whether Henry VIII ever visited the house of commons.

United States are federal, and in neither is there anything corresponding to the crown in parliament. Their constitutions start from the lowest forms of political association, which only delegate to the higher, remaining themselves the residuary legatees of sovereignty. The English constitution starts with the crown and works downwards; in England local legislatures only receive the powers the nation grants; in truly federal states the nation only receives those which the local assemblies bestow. The forms of federal government are more flattering than our own to popular susceptibility, but place greater impediments in the way of effective national action.

Parliament is thus an emanation from the crown; it was summoned by royal writs to meet in a royal palace, and the royal business always stood first on its medieval agenda. The crown accorded or rejected its petitions at will, and *le roy le veult* is still the phrase which, pronounced in parliament, makes an act. Throughout the middle ages the commons remain but suitors, and the lords the counsellors, of the crown in parliament. It is the crown which legislates, on the petition of the commons and the advice of the lords. Legislation in parliament has the highest sanction; but it is not the only method of legislating, and the crown has never been completely debarred from legislating without parliament by means of ordinance, proclamation, and order in council.[1] The financial needs of the crown and the commons' control of the purse made every parliament an exchange and mart, in which the commons bargained for legislation, and the crown for grants of money. But this was the custom and not the law of the constitution. If the crown needed no grants, the commons could extort no legislation; they could always petition, but the right of petition in itself confers no power to initiate legislation.

There was no doubt about the power of the crown to prevent legislation by lords and commons; there was more ambiguity about the power of the lords and commons to

[1] As recently as December 1919 the attorney-general argued in court that by proclamation the crown could prohibit every kind of import.

prevent legislation by the crown, and this legislation might be effected either in parliament or outside. Within the parliament chamber it might seem that legislation by the crown would be controlled by lords and commons. But effective machinery for this purpose was conspicuous by its absence at the close of the middle ages. The indispensable forms were few; a bill must be read in the parliament chamber, and the king must give his assent. But Henry VII thought he could pass an act of attainder in parliament without consulting the commons.[1] The judges decided against him, and he accepted their opinion. But the assent of the commons was often little more than a form. "Howbeit," writes a parliamentary correspondent of the said act of attainder, "ther was many gentlemen agaynst it, but it wold not be, for yt was the king's pleasure."[2] The lack of commons' *Journals* before 1547 makes it impossible to speak with confidence, but Bishop Stubbs's assumption that the account given by Sir Thomas Smith of Elizabeth's parliaments holds good for the fifteenth century is somewhat rash.[3] Of any three readings in either the lords or the commons there is no evidence before 1495, and any legal requirement of assent by the commons was fully met by the word, or even perhaps by the silence, of the Speaker at the bar of the parliament chamber. Bills, first read in the lords, were sometimes "transportatæ" across to the commons in the chapter house for their consideration; and their petitions were "baillées aux seigneurs." But many an act in the fifteenth century begins with none of the modern formulæ, but with such phraseology as "the king calling to remembrance," or "the king remembring" such and such circumstances, ordains, enacts, or establishes such and such a remedy, generally with, but often without mention of the assent of the lords spiritual and temporal and of the commons. There

[1] See my *Reign of Henry VII*, ii. 19; *Year Book*, 4 Henry VII, p. 18.
[2] *Ibid.*, i. 32.
[3] Stubbs, *Const. Hist.*, iii. 483. For reasons which I have given in *Trans. Royal Hist. Soc.*, 3rd Ser., viii. 26–7, the absence of commons' *Journals* before 1547 seems to me clearly due, not to loss of the MS., but to the fact that no *Journals* were compiled.

is sometimes a curious blend of the autocratic formulæ of Roman and papal law with parliamentary language which illustrates the menace of the "reception" to the English constitution. Edward IV, for instance, "of his most blessed disposition, mere motion, and certain science, by the advice and assent of the lords spiritual and temporal, and of the commons of this realm in this his present parliament assembled, and by authority of the same, ordaineth, enacteth, and establisheth that all and every acts and act made in any of the parliaments holden since the first day of his reign, or in this present parliament made or to be made, be not in any wise prejudicial" to the dean and canons of St. Mary's, Leicester.[1]

There was abundance of royal legislation in parliament in the reign of Henry VII. On the thirty-first day of parliament, in the twelfth year of his reign, the king "with his own hand delivered in a bill of trade then read";[2] and legislation thus royally introduced was not necessarily, and perhaps not at all, cast in the form of parliamentary petitions; it may have been Henry VIII or Thomas Cromwell who first selected this humble garb for the royal proposals. Nor was there yet any rule that all acts of parliament required the commons' consent. No doubt the "communes petitiones" represented the wish of the commons; but that house had as yet established no right to debar the individual petitioner from access to the crown in parliament; and the petition of the city of Gloucester to Edward IV in the parliament of 1473 is granted by the king by the advice of the lords, and is enrolled as an act of parliament, without any intervention by the commons.[3] The legislative power of the house of commons rests upon the denial of the right of the crown to legislate upon the petition of the individual. Individuals and groups of individuals can petition the crown, but no such petition can now become law unless it is adopted as a common petition of the house of commons. The right of the subject to secure legislation by individual petition to the crown in

[1] *Rot. Parl.*, vi. 48b. [2] *Cottoni Posthuma*, 1672, p. 54.
[3] *Rot. Parl.*, vi. 49; cf. *ibid.*, v. 68.

parliament was one of the medieval liberties destroyed by the growth of the house of commons. The commons could only limit the legislative discretion of the crown by controlling the approach of the individual petitioner, and the house adopted the practice of presenting petitions *ex parte* in order to block petitions not backed by themselves. Most of the individual petitions, which are becoming "private acts" in the fifteenth century, are presented in this way to the crown and lords in parliament; but the access of individuals to the crown in parliament was not yet completely barred, and the king could make acts in parliament on the petition of other bodies than the house of commons.

The commons themselves connived at a wide legislative discretion on the part of the crown outside parliament. In 1504 parliament, acquiescing in Henry VII's declared intention of not calling another together for a "long time," and recognizing the hardship thus inflicted on applicants for the repeal of their attainders, empowered the king to repeal several acts by letters patent.[1] By legalizing a benevolence in 1495, it countenanced royal taxation without parliamentary grant,[2] feeling perhaps that the individual's liberty was not more seriously violated by the gift he made to the king than by a tax imposed by parliament. Legislation concerning foreigners, if not regarded as being outside the scope of parliament, was held to be at least equally a matter for council; and in 1515 the lords determined that a certain bill *possit tam per concilium quam per actum parliamenti provideri, cum non concernat subditos domini regis, sed extraneos.*[3] Foreign trade came within this discretion, and in 1534 Henry VIII was authorized by act of parliament to repeal or revive all statutes since 1529 touch-

[1] 19 Henry VII, c. 28; *Rot. Parl.*, vi. 526; *Statutes of the Realm*, ii. 669. Edward IV exercised this power (Baldwin, p. 427) merely on the advice of his council. Parliament in 1523 gave it to Henry VIII for life (*Lords' Journals*, vol. i. p. cxxi.).

[2] 11 Henry VII, c. 10; *Statutes of the Realm*, ii. 576.

[3] *Lords' Journals*, i. 56. Cf. *ibid.*, i. 17: "Et dictum et decretum est per dominum cancellarium et episcopum Wynton., quoad provisiones pro mercatoribus de Hanse, quod provisio pro ipsis per regem signata sufficiet eis absque assensu dominorum aut domus communis"; also *ibid.*, i. 41.

ing exports or imports.[1] It seemed a greater extension of the royal prerogative when he was authorized to leave the crown by will, though he was never empowered to leave it away from his one child whose legitimacy was beyond dispute.[2] But the highwater mark of royal legislation was reached by the statute of proclamations, which gave them the force of law.[3]

This *lex regia* has excited so much attention, and gives rise to such apparent contradictions, that it deserves careful consideration. The point that most forcibly strikes the student of history, as distinct from the student of law, is the extent to which this act remained a dead letter. It may be that it was Cromwell's rather than Henry VIII's proposal; Bishop Gardiner relates a conversation between Henry VIII, Cromwell, and himself, in which Cromwell advocated the policy of making the king's will the law, and Gardiner replied by advising the king to make the law his will.[4] Cromwell fell in 1540, the year after the statute of proclamations was passed; Gardiner became the most influential of Henry's advisers, and the act was almost ignored. A hundred and twenty proclamations are known to have been issued between the passing of that statute and Henry's death,[5] and not one of these seems to depend for its validity on the statute. The great majority of them relate to matters arising out of the state of war between England and France in 1543, matters which down to this day are regulated by royal proclamation; and the rest were mostly the mere proclamation or publication of statutes passed by parliament. Either Henry VIII did not interpret the statute as conferring new powers of legislation on the crown, or else he refrained from using them. It is no less certain that he did not regard the statute as enabling him to dispense with the assistance of parliament in legislation. Sessions were as frequent after the statute

[1] 26 Henry VIII, c. 10.
[2] 28 Henry VIII, c. 7; 35 Henry VIII, c. 1.
[3] 31 Henry VIII, c. 8.
[4] Foxe, *Acts and Monuments*, vi. 45–6.
[5] Steele, *Tudor and Stuart Proclamations*, i. 20–31.

as before it, and the numerous bills that were introduced and passed give little support to the supposition that Henry could have achieved the same objects by proclamation. It never seems to have occurred to any one that the king might, for instance, have confiscated chantries by proclamation, although the bill for that purpose was hotly debated and narrowly escaped defeat.[1] Some bills were actually rejected, but no steps were taken to repair their loss by means of the powers which the statute of proclamations is supposed to have placed in Henry's hands.

The act would appear, then, to have been a piece of gratuitous dogma, more in keeping with Stuart pretensions than with Tudor practice, unless some other interpretation of it is possible. It may be, however, that Tudor lawyers were more literal than modern historians, and that when parliament passed "an act that proclamations made by the king shall be obeyed," it never dreamt of extending the sphere of proclamations or restricting that of parliamentary statutes. It simply meant that within their proper and recognized sphere proclamations were to have the binding force of law—and unless they have, they are useless even to-day. That sphere was, indeed, defined by the act itself, which provided that none of the king's lieges should "have any of his or their inheritances, lawful possessions, offices, liberties, privileges, franchises, goods or chattels taken from them or any of them, nor by virtue of the said act suffer any pains of death other than shall be hereafter in this act declared." It was not to be used to repeal any existing laws, "nor yet any lawful or laudable customs," and the people really affected by the act were "such persons which shall offend any proclamation to be made by the king's highness, his heirs or successors, for and concerning any kind of heresies against Christian religion." The act of proclamations was in effect an act to put into practice the theory of the act of supremacy. That act had been merely declaratory, and had contained no pains and penalties; the treason act of 1535 had, indeed, penalized

[1] See below, p. 336.

the denial of the royal supremacy, but it was the act of proclamations in 1539 which first gave the new supreme head something of the power of independent legislation which had belonged to the pope.[1] The supreme head of the church was not to be subject to parliamentary conditions in the exercise of his supremacy; and the ecclesiastical sovereign was to be the crown in council and not the crown in parliament. If there had ever been a crown in convocation other than the pope's, Henry VIII would assuredly have been tempted to retain and enhance the position, and to make the crown, rather than the crown in parliament, the link between church and state. As it was, the dichotomy of the provinces discouraged the presence of the crown, and the vicegerent was not at home in an ecclesiastical assembly. Cromwell had no successor in that capacity, and convocations were left to the prelates and proctors. The act of proclamations itself did not prevent the six articles from being an act of parliament and not a royal proclamation; and in 1547 the legislative independence of the supreme head was destroyed by Somerset's repeal of the act of proclamations.[2] The crown in parliament would not tolerate an English pope in council.

Cromwell, however, represented the crown elsewhere than in convocation,[3] and the real importance of his position

[1] Offenders were to be tried by the council (34 & 35 Henry VIII, c. 8), which was thus to exercise a jurisdiction similar to that exercised by the later high commission; although during the debate on the bill, promises were given that nothing should be done under it contrary to an act of parliament or common law (Gardiner to Somerset in Foxe, *Acts and Monuments*, vi. 43). This, however, was the ecclesiastical aspect of the statute of proclamations. Its general purpose was to revive the waning respect for royal proclamations. Such importance had in recent years come to be attached to parliamentary statute that the impression had been produced that other forms of legislation were very inferior in authority, if they were law at all. This was a far cry from the time when Edward I could enact all his legislation in council. Henry VIII did not attempt to recover Edward's comprehensive sphere, but the statute of proclamations gave him, within the shrunken limits of his legislative power, the same authority as parliament possessed in its more extended sphere.

[2] The repeal was effected by a single sentence in 1 Ed. VI, c. 12.

[3] It is notable that as vicegerent of the supreme head Cromwell was by 31 Henry VIII, c. 10, given a place in the house of lords on the right, or ecclesiastical side of the throne, and above the archbishop of Canterbury.

in parliament was due to the fact that, while the crown had a recognized place in the parliament chamber, it had none in the house of commons. Its absence accounts for some of the irresponsibility and factiousness of the commons during the fourteenth and fifteenth centuries; and when Henry VIII began to look for a lever in parliament against the prelates, both in their convocations and in the parliament chamber, he felt the need of some agency in the house of commons. This was the part designed for Cromwell from his first entry into Henry's service in 1529. Wolsey's intervention in 1523 had merely brought the Speaker, but not the commons to their knees, and subtler methods than intimidation were required to maintain harmony between ambitious monarchy and a rising house of commons. The separation had never been complete, for, while the commons withdrew from the parliament chamber to the chapter house, they were often accompanied by lords of the council and of parliament, deputed to give them the benefit of their wisdom and advice; often, too, the commons were directed to deliberate in some chamber in the palace, in order that they might be near the lords for consultation. But stronger bonds were needed than deputations; and harmony between crown and country could best be secured by identifying the agents of the crown with the representatives of the constituencies. The process, however, by which councillors became largely identified with elected members of parliament belongs rather to the position of the council than to that of the crown in parliament.[1]

The distinction was clearer in the sixteenth century than it is to-day, because the crown was then little more than the king, while the council was only a body of advisers whose advice need not be taken. The crown did not, so to speak, consist of the cabinet, and the crown in parliament was manifest in the very personal action of the Tudors. The practice of royal commission was in its infancy; and, although the expedient was adopted to save Henry VIII

[1] See below, pp. 295–7.

from the pain of giving a personal attendance at the attainting of his queens, the parliamentary action of Tudor sovereigns was, as a rule, immediate and direct. Not that the sovereign ever pronounced with his or her own mouth the decisive phrase *le roy le veult, le roy s'avisera,* or *soit fait comme il est desiré;*[1] and the notion that he signed or signs acts of parliament is a popular superstition.[2] The giving or withholding the royal assent was not quite so blunt a process; and the king would have had reason to complain had he been expected to make up his mind on the merits of a long list of bills awaiting his enactment during the brief interval which elapsed between the reading out of their titles by the clerk of the crown and the pronouncement of the royal decision by the mouth of the clerk of the parliaments. The king, like the commons and other "estates" of parliament, needed time and privacy for deliberation, which was impossible *in pleno parliamento,* where decisions were announced, but were not taken; and just as the commons had withdrawn from the parliament chamber to the commons' house, so the king decided upon his action, not in the parliament chamber, but in an adjoining council-room.[3] No doubt he had had earlier opportunities of acquainting himself with the contents of such bills as he had not personally inspired; but his final determination on the bills, as they emerged from the two houses, was reached in secret conclave on the last day of the session; and was announced by the clerk after the king, commons, and other "estates" had assembled *in pleno parliamento* for the crowning work of the session.[4]

[1] The third of these phrases was used when the bill was what we should now call a private bill (Hakewill, *Passing of Bills*, 1641, p. 78); other phrases were used for the royal acceptance of money grants.

[2] Palgrave went so far as to assert that "signatures are never found in ancient documents" (*Rep. on Petitions*, 1833, p. 21). When the king signed bills, he signed them before introduction; but these were only bills affecting the property of the crown, which cannot, even to-day, be introduced without the royal consent. A bill for the restitution of an attainted felon or traitor had to be signed in this way before introduction, because its passing would mean the crown's loss of the forfeited goods. Cf. Hunne's case in *Engl. Hist. Rev.*, July 1915, p. 482.

[3] Now called "the robing room" (May, *Parl. Practice*, ed. 1883, p. 593).

[4] "In the open parliament" is Hall's version in 1529 (*Chronicles*, p. 763).

It was not merely on this last day of the session or by the exercise of the veto that the crown partook of the business of parliamentary legislation. We have seen Henry VII introducing a bill with his own hand, seeking to pass another without consulting the commons, and drafting most of the acts of his parliaments in the language of royal edicts. The commons were a far less negligible quantity under Henry VIII, at any rate after 1529, and the autocratic form, at least, disappears from the phraseology of the statute book. The co-operation of lords and commons is always expressed in the language of an act, and parliament is always alleged as its authority. The king's "remembrances" and "considerations" are veiled behind the less personal terminology of parliament. It was Henry VIII's policy to envelop himself in parliament, and he did it with such success that the crown was never thenceforth able to divest itself of its parliamentary robes. He wove parliament like a garment round his royal carcase for protection; and the king-spun constitution of the realm was all the closer in texture because parliament had ever been an outcome of the crown. Henry VIII was not a mere member of parliament, but its very head; and when the head condescended to debate the six articles it confounded all the members by its learning.[1] Parliament met in the king's palace; its rooms were allotted by the king's chamberlain, and its members were sworn before the king's steward or his deputies;[2] it betrayed in all its trappings its origin as a feudal court. It was summoned, prorogued, adjourned, dissolved by the king or his ministers at his pleasure. Its clerks were the king's clerks, and even the serjeant-at-arms, who attended the Speaker of the house of commons, was a king's serjeant, appointed by him and removable at his pleasure. The king's attorney and solicitor-general, and his serjeants-at-law attended the house of lords, not as the servants of an autonomous house, but as the servants of the king, doing his service in

[1] *Letters and Papers*, xiv. i. 1040; Pocock (*Burnet*, vi. 233) prints "God's learning" for "his learning."
[2] D'Ewes, *Journals*, pp. 39–40.

his great council chamber.[1] The Speaker was nominated and paid by the crown,[2] though the nomination was veiled more decently than that of bishops after the second act of appeals; and the subsequent election by the commons only grew more real than the election of a bishop by his chapter with the contest over Onslow's election in 1566 and the success of the commons in Lenthall's case at the opening of the Long parliament. The lords, as befitted a royal council, never secured even the pretence of a power to elect a presiding officer, who could only preside in the absence of the king; and to this day the lord chancellor is appointed by the crown, and need not be a peer, except as a matter of deference to the historical fictions on which the lords have sought to build their house. The whole machinery of parliament was part of the permanent machinery of the crown temporarily applied to the purpose of holding the king's high court.

Gradually the two houses secured control of this machinery, but this control has been less perfectly won by the lords than by the commons, who could never be overridden by a threat to double their numbers by royal creation. Neither lords nor commons could, it is true, come to parliament without a royal summons; but while the crown summoned a peer by name, its summons to the commons was addressed to communities, who could choose what members they pleased. No doubt a good deal of pressure was brought to bear at different times upon constituencies to elect representatives acceptable to the crown; but this pressure was of little avail in the shires, and even in the boroughs it was not so formidable an obstacle to freedom of election as the influence of the county magnates. The crown could also create new boroughs by charter; but

[1] When Onslow was elected Speaker in 1566, it was contended, though unsuccessfully, that his duty as a serjeant-at-law in the upper house overrode the commons' claim on him as their Speaker (D'Ewes, pp. 98, 121; cf. Elsynge, p. 82).

[2] Tytler, *Edward VI*, ii. 163; Campbell's *Materials*, ii. 217. His fee in 1485 was £100; but in 1563 Speaker Williams writes that the allowance the queen was pleased to make was never certain, but more or less according to the length of the parliament (*Cal. S. P.* Dom., Addenda, 1547–65, p. 535).

as early as the reign of Elizabeth the motive for new creations was rather the political ambition of the constituency than the desire of the crown for "king's friends" in the house of commons; and secretary Wilson, replying to a petition for parliamentary representation from Newark in 1579, remarked that the government thought too many parliamentary seats had been created already, and was considering the question of reducing the number of rotten boroughs.[1] James I created university constituencies,[2] but Charles II's letters patent to Newark seem to have been the last occasion upon which the crown increased the house of commons by charter instead of by act of parliament.

With the lords it was different. An attempt was made in 1719 by the peerage bill to limit the power of creation by the crown.[3] It failed, and was not repeated; and while the power of the crown to modify the size of the house of commons has been abolished, its power to create peerages is unlimited. The bishops, too, have ever been in practice, though not in theory, royal nominees; and from the Reformation to the Revolution the royal supremacy over the church gave it great control of the house of lords. But its control over temporal peers diminished. During the Tudor period the crown could compel a peer's attendance; if for good reasons he were allowed to stay away, he had to seek royal licence to appoint his proxies, and over his choice the crown could exercise a veto.[4] The crown could also prevent an unwelcome attendance. There was no law requiring the crown to summon any one; alien peers were not summoned by Henry VII,[5] nor, apparently,

[1] See p. 159 *n*.

[2] Both universities received writs for James' first parliament, but apparently Cambridge made no return. James conferred a similar privilege upon Trinity College, Dublin, in 1613.

[3] Lecky, i. 230–1.

[4] Lodge, *Illustrations*, i. 252–3; cf. *Cottoni Posthuma*, pp. 264, 267; Elsynge, pp. 32, 119–20.

[5] For instance, Philibert de Chandé, the leader of Henry VII's Breton contingent in 1485, who was created earl of Bath, was never summoned to parliament; nor were Louis de Bruges and John de Bruges, who were successively earls of Winchester (see my *Henry VII*, iii. 320). The latter "resigned" his earldom in 1500 (Doyle, *Official Baronage*, iii. 700).

alien bishops by Henry VIII;[1] and some temporal peers who were not aliens seem to have been ignored.[2] But custom was hardening towards the creation of hereditary right, and in the reign of Charles I the lords laid down the doctrine, which Charles disputed, that the crown had lost the power of preventing, by neglect to summon or by countermanding the summons, a peer from attending the house of lords. The houses in the seventeenth century succeeded in reducing the crown's control of their personnel to the creation of peers.

They also succeeded in reducing almost to nothing the legislative powers of the crown both in and out of parliament. Under the Tudors the crown had legislated out of parliament by means of proclamations, and in parliament, not only by the negative method of the veto, but by the positive methods of introducing and amending bills. Henry VII added provisos to bills when giving the royal assent, and the provisos thus incorporated in the act became law without any consideration of them by lords or commons.[3] Queen Elizabeth exercised similar powers of amendment on one occasion at least,[4] but she seems to have been the last sovereign who did so. Parliament retorted on the crown the limitation of speech which Elizabeth is generally, though erroneously,[5] supposed to have imposed on the house of commons by the mouth of lord-keeper Puckering. "Your liberty of speech," he is misrepresented as saying, "consisteth in yea or nay." The liberty of the crown in legislation was reduced to a like dilemma, from which the

[1] *E.g.* Campeggio, bishop of Salisbury (1525–34), and John de Giglis, Silvester de Giglis, Julius de Medici, and Jerome de Ghinucci, bishops of Worcester between 1497 and 1534.

[2] *E.g.* Robert, lord Ogle, was not summoned between 1529 and 1544 (Round, *Studies in Peerage*, pp. 330 *sqq.*); and according to Chapuys Darcy and three bishops were forbidden to attend in 1534 (*Letters and Papers*, vii. 121). Chapuys is very unreliable in these matters, but Elsynge, clerk of the parliaments, writing as late as 1625, says: "Now of late they which are in the king's displeasure have had their summons, but with a letter from the lord chancellor or lord keeper not to come, but to send a proxy" (*Parliaments*, ed. 1768, p. 59).

[3] *Rot. Parl.*, vi. 182, 186–7, 460, 496.

[4] D'Ewes, *Journals*, p. 341*b*.

[5] See J. E. Neale in *Engl. Hist. Rev.*, xxxi. 128–37.

alternative was soon removed. Since the reign of Queen Anne the crown has lost all discretion in the matter of accepting or rejecting bills that have passed the two houses.

The disuse of the royal veto was not so serious a loss as the denial of the right of the crown to suspend and dispense with the law when made. For clearly it would not matter what laws were made if the crown could not be forced to carry them out; and this compulsion was the hardest of all the tasks for a legislature to impose on an executive. In the sixteenth century there was no idea of any such parliamentary coercion of the crown. Parliament alone could make laws, but the crown alone could carry them out, and it rested entirely with the crown to determine when, where, how, and to what extent the laws should be enforced. Parliament passed the act of six articles in 1539; it was no infraction of the constitution, as then understood, when the crown abstained for a year from enforcing its doctrine.[1] No penalties would have been incurred by any one had the crown and the church in Mary's reign refrained from burning a single heretic, notwithstanding the *de hæretico comburendo* statutes which parliament had re-enacted. In 1559 the act of supremacy enabled the crown to impose the oath of supremacy; it was considered prudence when Elizabeth refrained from exacting that oath from the judges and from Englishmen north of the Trent. Parliament, indeed, had hitherto limited its action to two objects: it had restrained the crown from moving in directions of which it disapproved; it had empowered the crown to move in directions of which it approved; but it had not compelled the crown to move at all.

A legislature cannot, however, ensure the administration of its own laws unless it controls the executive which admin-

[1] There are no penalties in the act of six articles; it is simply declaratory, like Henry VIII's act of supremacy. But common law and statute law already provided penalties enough for heresy; and the "bloodiness" of the "six articles" merely consisted in the doctrinal direction they gave to general powers of persecution with which Protestants themselves were loth to dispense.

isters them; and judgement is futile without execution. If the executive is to judge when and whether there shall be execution, the legislature has little part in government unless it controls the executive. There can be no real separation of powers in a self-governing community, and the Long parliament, early in its career, realized the futility of mere legislation. The fundamental issue was raised when parliament, in the Grand Remonstrance, demanded control of the king's choice of ministers and asserted their responsibility to it, while Charles retorted that government was nothing pertaining to subjects.[1] Occasions upon which it might be necessary to suspend or dispense with particular laws will never be lacking in any community, however perfect its laws or peaceful its people; but the judge of these occasions must be the maker of the laws. In other words, the maker of the laws must be the maker of the government.

In the sixteenth century the crown in council was the government, and the crown in parliament was the maker of the laws. Harmony was effected by the predominance of the crown in both. The subjection of parliament to Henry VII was much more patent than its subjection to his son; but the relative positions of crown and parliament under Henry VIII have often been regarded as the most striking illustrations of the unconstitutional character of Tudor rule. Yet the real gravamen of the charge of unconstitutional government against Henry VIII is not that he went about to break parliaments, but that he broke the bonds of Rome. It is difficult to discover anything unconstitutional in his relations with his parliaments; no king had for a century relied upon parliament to the extent that he did after 1529, and none did so again until the Revolution. There was nothing unconstitutional or unprecedented in his frequent presence in its midst, in its releasing him from his debts, enabling him to decide between rival claimants to the succession, or to legislate within his proper sphere by means of proclamations. But it was uncon-

[1] Gardiner, *Select Documents*, ed. 1889, pp. 129, 157, 171, 285.

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stitutional for parliament to deprive the pope of his spiritual jurisdiction, to dissolve royal marriages, and pass the act of six articles; or rather, these things were only constitutional in the light of a theory of parliamentary omnicompetence which had not been recognized before, and was repudiated by older jurisdictions. It was Henry's extension, and not his restraint, of parliament that makes his rule unprecedented. The claims of parliament to deal with the church were as much a usurpation as any papal pretension; and it was only the success of the revolution that made its principles constitutional.

Those principles were, however, established, and the crown in parliament became an undisputed sovereign with an unrestricted sovereignty. The emphasis was on the crown, but the crown sank beneath its weight. One child and two women, despite Elizabeth's vigour, could not countervail the emphasis of parliament; and before 1603 distraction was obvious in the partnership. The maker of the laws was no longer at one with their executor. A century of struggle under the Stuarts resulted in the victory of the legislature. The prize was the control of the administration, and the crown in parliament became to all intents and purposes the council in parliament, a council consisting of members of parliament, owing to parliament their position in council, and responsible to parliament for their conduct of affairs.

CHAPTER XIV

THE COUNCIL IN PARLIAMENT

THE king's council in parliament has, since the reign of Edward I, been the pivot of the English constitution, and to-day it is a distinguishing feature of British systems of government that the executive should be part and parcel of the legislature. The novelty of the cabinet does not consist in the link which it forms between the crown and parliament, but in the fact that by its means parliament controls the crown. The king's council had always formed a similar link, but by its means the crown controlled the parliaments. It is, however, modern phraseology, misapplied to most of our constitutional history, to speak of links between parliament and the crown. We might as well speak of links between man's mind and man; man is not man without a mind, and parliament was no parliament without the crown. Metaphors, however, and especially the metaphors of mechanics, fail to express the meaning of human associations. It is well to remember that councils and parliaments consist of men, and that when a man is a member of a council and of a parliament he is much more than a link between the two assemblies. Identity cannot be constituted by any amount of connexion, and much of the difficulty of understanding medieval history arises from the habit, to which the constitutional historian is prone, of regarding the different activities of the same men as distinct and definite institutions. A council is merely a body of men doing certain things "in council"; a parliament is often little more than the same men doing somewhat different things "in parliament"; and the difference between a council and a parliament lies for the

most part in the different things they do and their different modes of action. A parliament is at first no more than the counsellors of the king sitting in a particular kind of session called a parliament.[1]

A like anachronism of differentiation led Coke to multiply Edward I's council by four, and to crystallize its different functions into so many different bodies. But while it seems clear that Edward I had only one council, Edward II had two,[2] one which was chosen by him and was called his secret or privy council, and one which was forced upon him by his baronage and was called the *magnum concilium.* The two forms of council represented two rival parties, and their place in the constitution rose and fell with the varying fortunes of the king and the lords ordainers. No doubt both parties were working on the common foundation of a council without an adjective; but the barons were seeking to make it *magnum* and the king to keep it *secretum,* and there was little that was common to their finished products. One party produced the peerage, the other the privy council. The council has been the cockpit of contending factions and constitutional principles. Which was to be its master, the king or the barons, or, last of all, the commons? Upon that issue it would depend whether the council became a privy council, a *magnum concilium,* or a modern cabinet, and England an autocracy, an oligarchy, or a democracy.

The contest is fought in the open under Edward II and sometimes on the field of battle. But Edward III was strong enough to prevent open schism in the government, and the strife was conducted behind closed doors. Its

[1] Maitland calls it a "parliament of the council" (*Memoranda,* p. lxxx).

[2] Prof. Baldwin rather minimizes the distinction between the *magnum concilium* and the privy council, and contends that one was merely a full, and the other a secret, session of the same body. But it seems difficult on this theory to account for the definite article in the term *le grand conseil* which we find in Edward II's reign, or for the description of Wykeham as *capitalis secreti consilii et magni consilii gubernator* in 1377 (*Rot. Parl.,* iii. 388*a*); although the fact that he held these two offices and was also at the same time keeper of the privy seal indicates the common element in these councils. It is perhaps significant of the growing importance of the privy seal that Wykeham should be its keeper, after having been chancellor ten years before.

history is therefore obscure, and we can say little more than that the struggle was not one for the control of a definite institution, but one to define a vague claim on the part of the barons to give counsel to the crown and on the part of the crown to select its own advisers. Nor was it even so simple as that; for the actions of the crown were multifarious, and a right to advise it in some matters did not involve the right to advise it in all. The issue cannot be understood without reference to the gradual differentiation of the functions of government. It seems clear that the magnates established their claim to be the council of the crown for all matters, legislative or judicial, involving an alteration or interpretation of the law of tenure, at least of freehold tenure; and such petitions were regularly dealt with by legislation in parliaments containing a *magnum concilium*, or were referred for judicial decision *coram magno concilio* out of parliament.[1] With regard to matters of policy and administration the magnates were less successful. They did, indeed, succeed in reducing the status of the judges in the council, both in and out of parliament, to that of advisers without a vote; and the principle was ultimately accepted, and even asserted, by the judges themselves that they were "of council to the king" only for legal and not for political business.[2] The magnates also made efforts to exclude the clerical element from the council;[3] but they were naturally unsuccessful in their attempts to make the secret, continual, or privy council of the king a great council of magnates, just as their predecessors had failed in the reign of Henry II to prevent the conversion of the *curia regis* from an occasional assembly of turbulent barons into a regular body of expert justices. They might be *consiliarii nati* of the crown, but it remained with the crown to say when it wanted their counsel; and the *magna concilia* of the fifteenth century were always

[1] Cf. Baldwin, pp. 279–80, 325, 334. Possibly the "law of the land" meant the "landlaw."

[2] Nicolas, *Proc. of Privy Council*, i. 76, iii. 151, v. 76–9, 268–9; Baldwin, pp. 76–8, 205.

[3] Baldwin, p. 83.

specialiter congregata, while the secret council was *continuum*, and needed no special summons.[1]

This secret or continual council took more or less definite form in the reign of Richard II. Nicolas's *Proceedings* begin in 1386,[2] and a *Journal* of the council has lately been found for 1392–3.[3] This council had a clerk of its own, charged to keep its minutes,[4] and Richard II relied on it to control his unruly uncles and enable him to develop a preliminary sketch of the "new" monarchy. His failure produced a reaction towards a *magnum concilium*, and *grands conseils* become frequent with the accession of Henry IV.[5] It is possible to regard the council as a single institution, of which the *grand conseil* was an occasional expansion, and the privy council a more continuous contraction;[6] but it is obvious that these expanded and contracted sessions were tending to form distinct institutions. In 1377 Wykeham was described as *capitalis secreti et magni consilii gubernator;* a room, in Westminster Palace was called *camera magni consilii*, and we find the definite article in *le grand conseil* and the *seigneurs du grand conseil du roy*.[7] We can no more regard the great and privy councils as a single institution merely because the greater contained the less, than we can identify parliament with the council because a session of the council was the core of every parliament; and we must not deny a distinction because it is hard to draw.

Discrimination is not, indeed, easy as regards size, *per-*

[1] Nicolas, *Proc. of Privy Council*, iii. 322, iv. 262.

[2] These *Proceedings* do not represent a register or regular series of any kind; and Nicolas's volumes are for the most part made up of scattered notes collected from many sources. He prints, however, a "council-book" extending from 1421 to 1435, and a collection of original minutes to 1460. Between 1435 and 1539 there is another gap in the council-books, which are, however, fairly continuous from 1539 onwards.

[3] Baldwin, pp. 389–90.

[4] There are "clerici" of the council in Edward III's reign, but they are probably "clerics," rather than clerks, of the council, in contrast with the "lords" and "bachelors" of the council.

[5] Nicolas, i. 102, 107, 144, 156, 180.

[6] The secret council is often called the privy council in Henry VII's reign; but the phrase *en prive conseil* which occurs in 1381 (Baldwin, p. 125) means "in private conclave," and not "in the privy council."

[7] Baldwin, p. 369; *Rot. Parl.*, iii. 388*a*; Nicolas, i. 180, iii. 223.

sonnel, or functions. We have record of a *grand conseil* consisting of ninety-two members;[1] but another contained but thirty-three,[2] while a council which is not called great numbered as many as thirty-two.[3] The same variety of "estates"—dukes, bishops, abbots, earls, barons, bannerets, bachelors, knights, esquires—might be represented in the great and in the privy council;[4] both were summoned under the privy seal, they had the same clerk, and such records as were kept were on indiscriminate files.[5] Nor were their functions more clearly distinct. That of a *grand conseil* was probouleutic, and in the fifteenth century it seems generally to have been called to consider whether a parliament was necessary or not. In 1389 a larger council than usual advised the summons of parliament.[6] In February 1400 a great council taxed itself in order to avoid a parliament and taxing the common people.[7] A few months later another great council considered whether it was possible to declare war without consulting parliament, and diverse views were expressed.[8] In 1430 a great council agreed that a parliament should be held, and in 1432 a great council, sitting in the parliament chamber at Westminster, presented a petition relating to taxation, tallages, and the war with France.[9] In 1433 a great council sat in the green chamber at Westminster (where another council sat in 1437 without being great), and we find a distinction drawn between the king's great council in parliament and the king's great council out of parliament.[10] Bedford in 1434 speaks of his

[1] Nicolas, vi. 290–1.

[2] *Ibid.*, i. 102; the *conseil* mentioned (*ibid.*, i. 144) seems to have been *grand*, although it had only twenty-three members.

[3] *Ibid.*, ii. 7.

[4] Baldwin, p. 121; Nicolas, i. 18, 59, 100, 102, 144, 156, 237, ii. 85–9, 98–9, 156, iv. pp. xxxv–vi, lx, lxvi, 262, v. 64–5, vi. 214–16, 290–1, 298, 333–4, 339–41.

[5] Council records were "filed," chancery records enrolled; one of the objections to the council was that its records were not enrolled, and could not, therefore, be "counter-rolled," or controlled, "comptroller" being the English for "contrarotulator."

[6] Nicolas, i. 17; cf. *Rot. Parl.*, ii. 146.

[7] Nicolas, i. 102, 107.

[8] *Ibid.*, i. 144.

[9] *Ibid.*, iv., Chron. Cat., pp. x–xi, xxxvi.

[10] *Ibid.*, iv. 105, 185–6, v. 153.

services "as well in your said parliament as in your great council," and in 1430 his letters, directed "al consilio privato regis," distinguish between it and "magno concilio specialiter congregato."[1] In 1435 a great council at Sheen,[2] consisting apparently of only twenty-two members, nearly all peers, discussed the Council of Basle, relations with France, and other matters. In October 1454 fourteen bishops, two dukes, eight earls, and seventeen barons were summoned to a great council (thirteen more were summoned later) which drew up ordinances to regulate the king's household.[3] To another great council next year there were summoned eighteen bishops, twenty-four abbots and priors, five dukes, nine earls, the prior of St. John of Jerusalem, and thirty-five barons.[4] This list well-nigh exhausted the peerage, and few parliaments contained as many as the ninety-two who were summoned to this great council. Early in Henry VI's minority it was asserted that the government appertained to the lords spiritual and temporal assembled in parliament, in the great council, or in the continual council;[5] and on the eve of the Wars of the Roses the great council was little more than the "house" of lords out of parliament.[6] The knights and esquires, who figured largely in the great councils of early Lancastrian years, had disappeared.[7] The great council had grown at once both greater and less comprehensive, and the omission of commoners was outweighed by including nearly the whole of "the peerage." The wheel had come full circle, and had brought the great council back to the point at which it stood in 1258 and 1311. It was the old alternative, baronage or the crown, a great or a privy council.

Thirty years of civil war disposed of the claims of the great council to govern England, and then the Tudors

[1] Nicolas, iii. 322, iv. 225. [2] *Ibid.*, v. 64–5.
[3] *Ibid.*, vi. 216–23. [4] *Ibid.*, vi. 290–1. [5] *Ibid.*, iii. 233.
[6] This assimilation was helped by the narrowing of the "peerage." There was a broad distinction between "the great council" and the "peers of the land" in 1352 (*Rot. Parl.*, ii. 245).
[7] In 1455, however, one or two knights or esquires were summoned from each county to attend a council (*ibid.*, vi. 339–41).

created a real and lasting privy council. This was the work of Henry VIII and not of his father. Henry VII's council is an enigma; once or twice at least he called a great council, in which appointments were made and war was discussed with France. Of a privy council no mention has been found, and it might seem that his council was simply a number of men whom the king consulted as individuals if and when and how he pleased. Yet there were "council-times"; and a president of the council, whose office is commonly dated from 1530, existed in 1499 in the person of FitzJames, Bishop of London, and in 1506 in that of the notorious Edmund Dudley.[1] It may be that Henry VII felt his monarchy to be too new to risk giving it a master in the shape of an organized council; he needed advice, but he did not want control, and he preferred the private advice of a minister to that of a council meeting. At any rate, the organization of the privy council seems to date from 1520. Henry VIII had, indeed, a council from his accession, but it appears to have been a loose and unwieldy affair until Wolsey superseded it for most practical purposes. In 1520, however, the king selected twenty of its members to attend his royal person; and of these twenty ten were to "give continual attendance in the causes of his said council, unto what place soever his highness shall resort."[2] This was only an outline, which was not filled in until after Wolsey's fall, and the inner ring of ten does not correspond with the later organization of the council. But twenty remained the average number of privy councillors under the Tudors, who were clearly marked off from the "ordinary" council.[3]

[1] *Cal. Patent Rolls*, Henry VII, ii. 471. The obscurity surrounding the council is illustrated by the fact that this detail in Dudley's biography remained unknown until the publication of this volume of the Patent Rolls in 1916.

[2] Nicolas, vii. pp. v–vi.

[3] Councillors not sworn of the privy council are said to have been members of the *concilium ordinarium*, a phrase unknown apparently in the Middle Ages (Baldwin, p. 112), and perhaps invented by Sir E. Coke. Cf. Sir R. Wingfield's remarks: "It is above twenty-four years since I was first sworn of the king's council, and after of his private council, being his vice-chamberlain," and "I have been sworn of his council above twenty years and of his privy council above fourteen years" (*Letters and Papers of Henry VIII*, vii. 1525, viii. 225). The "king's

The *grand conseil* sank beneath the weight of England's *grand monarque*.

When it was averred in 1427 that the government of England (during a royal minority) appertained to the lords spiritual and temporal, in parliament, great council, or continual council assembled, the varying form of the assemblies was clearly regarded as a mere matter of detail, compared with the essential identity of their constituency; and the sole advantage of a great over the privy council consisted in the weight and wisdom of a multitude. The matters discussed in great councils were also discussed, and could be decided, in privy councils. When the great council advised the summons of parliament, it was not the great but the privy council which instructed the privy seal to move the lord chancellor to issue the writs; and it could have done so without a great council at all. There is no principle of discrimination between the councils of Henry VI. The abeyance of monarchy undermined the foundations of privy councils, just as its revival under the Tudors proved fatal to great councils. "Great" and "privy" are, in fact, simply expressions of aristocracy and monarchy in terms of the council. The distinction is only marked while the struggle is even, as it was under Henry III and Edward II. The predominance of over-mighty subjects in the fifteenth century disintegrates the privy council, and the triumph of a Tudor king reduces the great council to a nullity. The council under Henry VI grew so great and so diffuse that it lost all specific gravity, and the lack of central governance led naturally to local anarchy and civil war. It was the failure of conciliar government in the fifteenth century that made straight the path for personal monarchy in the national state as well as in the catholic church.

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counsel learned in the law" never formed a council; they were simply the legal members of the council. The *commune concilium* is still more elusive; in Magna Carta it probably means "common advice," but Thomas Kent is said to be described as "clericus communis consilii domini regis" on the *Coram Rege* roll, 30 Henry VI, m. 8 (Vernon Harcourt, *His Grace the Steward*, p. 385 *n.*).

Some discussion of the king's council was a necessary prelude to any examination of the position of the king's council in parliament. The question is obscure, because the position is involved: *habet enim rex curiam suam in consilio suo in parliamentis suis.* But there is no doubt about the immanence of the council in parliament, and the history of the conflict between executive and legislative is more precisely the process of determining what the council can do by itself and what it can only do in parliament. It may help us if we remember that when we speak of parliament doing anything at all, we are employing what is perhaps the most convenient fiction in the constitution. It is a figure of speech like that employed by Americans when they say that "congress" does this, that, or the other, or by Wesleyans when they speak of "conference" settling the affairs of their community. Really, it is certain people in parliament, in congress, in conference, who do these things; and the association of parliament with the active voice is a modern development. In the middle ages parliament is always passive: the king holds a parliament, summons a parliament, and does many things in and to a parliament. Others besides the king may also do things in parliament, but parliament itself does nothing; it does not even grant taxes. The "estates" tax themselves in parliament, but parliament does not tax them.[1] Justice is done and law is made in parliament; but it is the king in council who judges and ordains. In course of time the reality becomes a form, the petition of the commons determines the act of the king in parliament, and inertia is transmuted into energy. Parliament, however, remained a convenient ambiguity

[1] It is a fundamental though gradual change when, during the fifteenth and sixteenth centuries, taxes, instead of being several grants severally made by different estates in parliament, take a legislative form, and derive their sanction, not from the good-will of the givers, but from the sovereignty of the legislature; and there is no better illustration of (*a*) the amalgamation of the estates into the state, and (*b*) the consequent growth of the sovereignty of parliament. Taxation became a part of positive law, and it was against this "imposition" that the American colonists, reverting to medieval ideas, rebelled. Prof. McIlwain's criticism of the sovereignty of parliament is based on the same idea (see *History*, iii. 162–4).

for the crown in parliament, the lords in parliament, the commons in parliament, as well as for any combination of the three; and it is more decent to say that the parliament act of 1911 was passed by parliament than that it was dictated by a majority in the house of commons.

Parliament in the middle ages was, therefore, a set of conditions under which men acted rather than itself the agent. The atmosphere was that of a royal and feudal court, held in the "hall" of a king's palace with its precincts marked by the "verge" of the king's lord steward. The presence of the king's council was essential to the *curia*. There were endless councils without a parliament; there could be no parliament without a council. The council was the first of the constituent elements in parliament; and it is very difficult to say at what point any other element becomes essential. The earliest "Rolls of Parliaments" are not concerned with the doings of an elected or a representative assembly, and the acts of councils continue to be entered on the "Rolls of Parliaments" down at least to 1371, and for two generations later, so far as the council was determining matters referred to it by parliament.[1] Indeed, one of the reasons why council records do not begin until the reign of Richard II is that councils and parliaments had not been clearly enough differentiated to require different kinds of records. The whole of Edward I's original work as a legislator was done in council before he summoned his model parliament of 1295; and his successors continued for more than a century to enter on the parliament rolls, which always remained in the custody of the council,[2]

[1] Baldwin, pp. 107, 386; cf. *Rot. Parl.*, ii. 304, iv. 334, 506. The council also used the rolls of chancery and of the exchequer for recording its proceedings. It had no roll of its own, and used the rolls of its three chief organs, the council in chancery, the council in the exchequer, and the council in parliament. Like parliament, the council depended upon the agency of the executive departments which had developed before either of the deliberative organs of the constitution.

[2] Maitland asked (*Memoranda*, p. lxxxiii) when the parliament roll passed out of the custody of the council into that of the house of lords. The answer appears to be "never." The rolls of parliament have always been chancery records (since they were lost by the exchequer). The *Journals*, of course, have, on the other hand, always been in the custody of the houses.

judicial decisions adopted out of parliament. There was apparently down to 1322 no parliamentary function, save that of taxation, which could not be discharged by the council alone; and even the saving clause needs qualification. Merchants often taxed themselves in unparliamentary meetings, and as late as 1400 the "estates" in a *grand conseil* taxed themselves to avoid recourse to parliament.[1] In 1371 a great council had even varied a subsidy previously granted in parliament.[2] We trace a distinction, which seems clear enough in modern times, back to a period in which the line is blurred and wavering, and then farther to where it disappears altogether; in history, as in the simpler biological studies, absolute origins are beyond our ken.[3]

The council in parliament is thus a session or series of sessions of the council expanded in ways and for purposes which by degrees become more and more definite. The first purpose was certainly to provide the freest access for petitioners to the council. It has been said that parliament sought, by appointing receivers and triers of petitions, to deprive the council of its jurisdiction, as it also sought to deprive it of legislation.[4] But this view attributes to parliament a conscious activity the centre of which is difficult to locate. Things done in parliament are sometimes done by one estate or other, but more often by the council or the crown. It is true that the commons grew more and more insistent that their petitions should be turned by the council in parliament into statutes, but that is not quite the same thing as depriving the council of legislation, and the council had invited petitions in parliament long before

[1] Nicolas, i. 107. It was possible to speak of the "estate" of councillor, which ranked next to an earl's (Baldwin, p. 402), and also of the "estates" of the council, as well as of the estates of parliament and of the estates of the church (Nicolas, v. 88); but in no case was the number limited to three.

[2] *Rot. Parl.*, ii. 304; cf. *ibid.* iv. 301. See below, p. 330.

[3] There are two technical distinctions between parliaments and councils. Parliaments are always summoned under the great seal, councils under the privy seal. Secondly, the warrant to the chancellor to summon a parliament mentioned no names, while they were always specified in the warrants to the lord privy seal to summon a council. Cf. Elsynge, pp. 63-4.

[4] Baldwin, p. 324.

the commons developed a will of their own or devised the means of expressing it. The receivers and triers were, moreover, appointed by the council, and probably before parliament met. Their names were certainly announced in 1341 some days before the attendance was sufficient for the business of parliament to begin.[1] The appointment in parliament of a bishop, two earls, and two barons to hear and determine all complaints against the king's ministers for infractions of the ordinances of 1311,[2] seems to have been an abnormal demand on the part of the lords ordainers; and the more usual practice was for the council to appoint triers of petitions to determine such as they could and merely refer the rest to parliament. It was the council which arranged that petitions presented in parliament should be free of charge, while writs sued out of lower courts required fees; kept procedure in parliament free from the petrifying formalities of common law; and provided in parliament a means for reviewing and correcting the whole administration of justice. It is a late development of self-consciousness when the creature comes to regard itself as its own creator.

The second purpose for which the council held expanded sessions in parliament was to provide for the grant of taxation under the guidance of those who required the taxes and would spend them; and the somewhat monotonous series of addresses with which parliaments were opened in the middle ages played no small part in the slow education of the commons in the sense of political responsibility. Grants might have been extorted locally; but, granted in scores and hundreds of local gatherings, they would have been voted without that realization of national necessity which is the foundation of all responsible government; and it might have been thought that the inevitable place in which these explanations should have been made, and these taxes voted, was the court to which all the king's lieges owed suit and service, were it not for the fact that outside England the king's highest court

[1] *Rot. Parl.*, ii. 126. [2] *Ibid.*, i. 286.

and the estates-general were divorced, and taxes were not granted where justice might be done in return. Fortunately in England the council remained embedded in parliament, while parliament came to imply an ever fuller representation of all sorts and estates of men.

This continuance of the council in parliament is a feature of the English constitution which parliament itself in the seventeenth and early eighteenth centuries endeavoured in vain to efface and destroy. At the end of the middle ages the parliament chamber is alternatively called the great council chamber. In 1539 we have a detailed statute regulating the place of councillors in the upper house, whether they are peers or not; and in 1541 we read that "on 21 March the council sat not, for that they sat both forenoon and afternoon at the parliament." [1] It was not until after the Revolution that attempts were made by means of place bills to exclude the council from the house of commons. They failed of their purpose, and they never applied to the house of lords. Historical development and the spirit of the constitution proved too strong for the doctrinaire philosophy and prejudices of the revolutionary Whigs.

More complicated than the retention of the council in parliament was the definition of the council to be retained therein. We have seen that "council" might be protean in its variety. It might be a large council of magnates or a minute council of ministers; it might represent a baronial opposition or a monarchical administration. Which was to be its predominant characteristic when it sat in the midst of the estates in parliament assembled? Would the council preserve the shadowy unity which its growing diversities had not quite destroyed in the middle ages, or would it become so fixed in its diverse aspects that all sense and all appearance of identity would be lost? This seems, in fact, to have been the fate of the council. The diverse trend towards a great and a privy council got beyond control, and the two aspects of the council became

[1] Nicolas, vii. 329, 330.

two different things. In other words, the expanded session of the council in parliament set up for itself as a house of lords, while the privy council was preserved as the administrative organ of the crown.[1] Both, however, continued inherent in parliament, though the schism between great and privy councils led to the emphasis of the connexion between the great council and parliament, and weakened that between parliament and the privy council; and to this discrimination is due the differentiation between the legislature and executive. The great council dissociated itself, or emancipated itself, more and more from the crown, and became less and less a council, although its members continued their claim to be *consiliarii nati* of the king. The privy council, on the other hand, came to be more and more regarded as an executive body, whose claims to legislate were viewed with increasing distrust.

The process by which the great council emancipated itself from the crown and became a house of parliament was the evolution of the theory of a peerage. Its earlier stages have already been indicated.[2] The possession of certain rights of jurisdiction, or the possession of certain lands, called a barony, to which these rights were attached, came to be regarded as constituting a peerage of the realm, and as entitling the possessor to a special writ of summons whenever a great council or a parliament was held. It was originally a liability, rather than a right, which was attached to tenure *per baroniam*, and in the fourteenth century kings were moved to impose or threaten heavy penalties for disobedience to the summons. The peers, indeed, were more anxious to deny to others the rights of

[1] The distinction was less clear when the council sat in the Star chamber and came to be called a "court"; it was sometimes even called a "senate" ("coram dominis in regio senatu secus nuncupato the Sterre Chamber," *Lords' Journals*, i. 72), and barons claimed as barons, but unsuccessfully, a right to be summoned to it as they were to the house of lords. Their failure to establish their claim was possibly due to the fact that cases involving a peer's loss of freehold were dealt with, not in the Star chamber, but by the peers in parliament; and their land was ever the main concern of the "pieres de la terre." Other matters might be left to the crown and council.

[2] In chapter v.

peerage than to fulfil their own duties themselves; and at the very time that measures were being taken to punish their neglect of parliament, they were insisting that other members of the council were no more than assistants or attendants without a right to vote. This reduction of the status of the judges and law officers of the crown affected both the council in parliament and the council out of parliament. From the middle of the fourteenth century they ceased, it is said, to be sworn of the council[1] and became merely legal assessors. As such they continued to sit in parliament, but even under Henry VIII, who was no respecter of peers, it was admitted that the king's lord chancellor himself had no right or interest entitling him to a vote in parliament unless he were a peer. The same measure was meted out to other councillors of the crown: the attorney- and solicitor-general and the king's serjeants-at-law continued to receive the councillor's special writ of summons to parliament, and the former do to this day, though they never obey the summons, and the abolition of the order of the coif put an end to another rusty link between council and parliament. But constant though their presence was in Tudor parliaments, and active as their service—and that of their colleagues, the masters in chancery[2]—was in the upper house, these legal dignitaries had no vote on the legislation which they prepared. So, too, the other official members of the council were reduced to the position of advisers to the peers. The great officers of state were given a place by statute in the house of lords whether they were peers or not;[3] but if they were not peers they

[1] Baldwin, p. 76. This statement is subject to considerable reservations; it can only mean that the judges ceased to be political advisers of the king. They remained his legal councillors, and the two chief justices were, as a matter of fact, sworn of the privy council in the sixteenth century. The lord chancellor, moreover, has never been deprived of his place in council.

[2] In 1536 the northern rebels complained at Pontefract that "those of the chancery" were growing neglectful of their "office amongst the lords" in not providing them with copies of bills before they were introduced in the commons (Dodds, *Pilgrimage of Grace*, i. 360; *Engl. Hist. Rev.*, v. 568; *Letters and Papers*, xii. i. 410).

[3] 31 Henry VIII, c. 10.

sat lower than if they were, on their respective benches, while the secretaries were banished to the upper woolsack beside the chancellor.[1] Apart from the legal members no such discrimination between peers and other councillors was suffered to disturb the council out of parliament; and commoners like Thomas Cromwell and Sir Francis Walsingham were just as much "lords of the council" as their noble colleagues. Indeed, the success of the peers in parliament was counterbalanced by their failure in the council out of parliament. There the council became effectively royal and privy; the *magnum* dropped off from *concilium*, and the magnates under the Tudors almost disappeared from the privy council. Such peers as survived were almost all of the newest creation. Cromwell and Cecil were not of the council because they were peers; they were made peers because they had long served in the council, while others, such as Walsingham, were nearly as influential without attaining to peerage at all.

Nor did the reduction of councillors to the position of assistants in the house of lords render their assistance a negligible quantity. Tudor law was judge-made law, not so much by interpretation in the courts, as by discussion in council; and the year-books and law reports are replete with judicial decisions on constitutional principles.[2] The judges did, in fact, in Tudor times fulfil to some extent the function of the supreme court under the constitution of the United States, and Bacon's encomium of the consultation of judges by the crown was a deduction from his historical study of Henry VII's reign. It was the judges who decided that Henry could not pass an act of attainder without the consent of the commons, and Henry accepted

[1] See above, p. 251. Behind the lower woolsack sat or knelt the clerks of parliament. Barons of the exchequer had apparently no regular place in parliament. They were summoned in 1305 (Maitland, *Memoranda*, pp. cvii–viii), but not apparently in Edward III's reign (cf. *Cal. Close Rolls* 1374–77, 1377–81, *passim*). Glover, however, in his *Pompa Parliamentaris* gives them as present in 1585, while D'Ewes' picture represents them as absent; see Appendix.

[2] Apparently the judges sat for this purpose (among others) in the exchequer chamber, and discussed principles without necessarily waiting for a case to be brought before them by a writ of error.

their verdict as final. It was the judges who, in the first two months of his reign, discussed what should be done in parliament with the problem of a king *de facto* who was *de jure* an attainted traitor, and a Speaker who was in an equally parlous case.[1] It was the judges, too, who laid down the principle of Poynings' law years before its enactment, and they also determined the procedure by writ of error in parliament, declared that there were things which parliament could not do by statute, decided what bills should be promoted by the government, and defined the limits of ecclesiastical franchise. The precise relation of this judicial action to parliament has not been explained; but whether the advice was tendered in or out of parliament, and whether it was regarded as advice or decision, it is clear that both crown and parliament acted upon it.

The legal members of the council were equally active in sessions that were undoubtedly parliamentary. It has been thought that they were really responsible for the provisos which the king frequently added to bills when giving the royal assent, and that they exercised the chief influence in that meeting in the robing chamber of the palace which decided whether the royal assent should be given at all. Under Henry VI it had been referred to the two chief justices to determine which of the acts passed in parliament should be considered statutes and proclaimed, and which should be merely handed over to the clerk of the council;[2] and it may be that the judges were responsible for no slight alterations in bills between their passage in parliament and their final appearance on the statute rolls. In parliament itself the lawyers of the council had much to do with legislation; and in the first years of Henry VIII's reign, at least, a bill was rarely committed to any one else.[3] At every stage, indeed, their influence was felt—in the preliminary discussion

[1] *Year-Books*, Henry VII, ed. 1679, p. 4; cf. my *Henry VII*, ii. 10–11.

[2] Nicolas, iii. 22.

[3] *Lords' Journals*, i. 1–57 *passim*; the judges, the attorney- and solicitor-general, the serjeants-at-law, and masters in chancery were the usual committees for bills; on one occasion (*ibid.*, p. 56) a bill was committed by the lords to the attorney-general "to be reformed" after it had reached an eighth reading.

of principles before the bills were framed, in their actual drafting, in their amendment during passage, in the royal provisos, and in their final form on the statute-book. The laws of England would have been singular things had it been left to peers and popular representatives to make them; and the king's council in parliament played no small part in English constitutional history.

Notwithstanding these eminent services to parliamentary legislation, the position of the council in parliament grew more precarious. Henry's act of 1539, indeed, gave some councillors a statutory right to attend the house of lords, independent of a peerage; but unless they were peers they could not vote, and the act did nothing for those councillors who held no great office of state. It was anomalous that a lord chancellor like Sir Thomas More should preside over, and day by day adjourn, the council [1] in parliament without even a casting vote in its proceedings; and the anomaly was only removed by the growing practice of creating the chancellor a peer, which incidentally ruled out from the chancellorship any ecclesiastic who was not a bishop. By the same intrusion of peerage into the council in parliament other great offices of state were restricted to peers; and those who were not peers were deprived of their traditional place in parliament, which they had occupied since its origin, when the core of every parliament was a session of the council.

From the menace of this exclusion from parliament the council was saved by the house of commons, and the constituencies welcomed those whom the peers had rejected. The multitude of privy councillors in the house of commons during the Tudor period has often been used as a proof of the packing of parliament; but the contention ignores the fact that so long as parliaments had existed councillors had received their special writs of summons. It is a strange inversion of parliamentary history, and the real novelty of Tudor times was not that councillors sat in parliament, but

[1] The entry of an adjournment of the house of lords in its *Journals* during the session of 1533 is frequently "hodierno *consilio* soluto."

that they sat as elected representatives instead of as crown nominees, just as the attorney- and solicitor-general to-day prefer—unless indeed they have no option—the risks of contested election to obedience to a certain royal summons. The change was twofold: councillors sat in the house of commons instead of in the house of lords, and they sought election. It was natural that they should think they had some claim upon the constituencies, and that the electors were not making any great concession in choosing those who had, in any case, a legal right to sit in parliament. Probably to-day, if peers of the United Kingdom could sit in the house of commons, it would not be considered an arbitrary proceeding to offer themselves for election. Under the circumstances the amount of pressure actually brought to bear upon constituencies to elect privy councillors as their members seems to have been slight; probably they were as glad then to get privy councillors to represent them as they are to-day to get cabinet ministers as candidates.

The change, by which privy councillors submitted to popular election and sat in the house of commons, is important as a recognition of the growing weight of the house of commons and of the popular element in the constitution. It points in the same direction as the election of the eldest sons of peers, the purchase of boroughs, the bribery of electors, the ambition of aspiring politicians to become members, the abeyance of residence as a qualification, and the capture of country seats by London lawyers. Possibly the transference of councillors from the upper to the lower house was by way of preference rather than compulsion, and they vacated their place in the house of lords because they found greater respect and an ampler scope in the house of commons. In the upper house they had become assistants, if not servants; in the lower they were more than equal to their colleagues. They formed the link between the government and the commons, and did their best to produce harmony between the two. Both Cromwell and Cecil owed their influence largely to their position in

the commons, and they regularly reported to their sovereigns the feeling of the house,[1] and to the house the wishes of the government. The privy councillors always formed part of the deputations sent by the house to impress its views on Queen Elizabeth with regard to such matters as her marriage, the succession to the throne, the execution of Mary Stuart, and abuses like monopolies; and when supply was under discussion the amount was always referred to a committee which consisted of the privy councillors in the house and an equal number of private members.[2] Their position was that of genuine mediators; they performed a duty to the house as well as to the crown, and they did not always agree with one another in what they said in debate. It was the divorce between the Stuarts and their people which rendered their position untenable, and raised the issue whether they were servants of the house or ministers of the crown.

It would hardly be an exaggeration to say that this identification of privy councillors with popular representatives was as important a stage in the development of responsible government as the growth of representation itself; for responsible government was not established by summoning representatives to Westminster, but by embodying those representatives in the government or the government in those representatives. If parliament was to remain something more than an irresponsible opposition, there must be unity between it and the government; and responsible government involves the responsibility of the executive as well as that of the legislature. The executive must be responsible to the legislature, but in an equal measure the legislature must be responsible for the government. In the middle ages a connexion, if not unity, had been maintained by the presence of the council in parlia-

[1] Cf. Cromwell's letter to Henry VIII in 1534 (*Letters and Papers*, vii. 51). In Elizabeth's reign the house grew sometimes restive over these reports, and still more so under the Stuarts; but to make them has continued to be a regular duty of the leader of the house.

[2] D'Ewes, *Journals*, p. 124; *Commons' Journals*, i. 53, 74, 83, 104, 116, 119.

ment, and by the advice that was constantly given by councillors and magnates to the commons in their domestic sessions in the chapter house. The tendency to exclude councillors as such from parliament threatened a complete separation of powers; and the danger was only averted by making some councillors peers and securing for others seats in the house of commons. The council in parliament was thus preserved from extinction; and it was the council in its most royal and "privy" form that was saved, not merely the council in that "great" and attenuated form in which it assumed the guise of the house of lords.

CHAPTER XV

THE PEERS IN PARLIAMENT

THE house of lords has long been regarded as the most stable and conservative element in the British constitution, and among the claims that have been made on its behalf to the political gratitude of the English people is the assertion that seven hundred years ago it extorted Magna Carta from King John. In reality, few elements in the constitution have been based upon a more ambiguous foundation or have suffered more radical changes. The lords themselves are still in doubt about their origin; and while they agree on the palpable fiction that Edward I created, and intended to create, a number of hereditary peerages, they differ as to the date of the creation, and within recent years they have decided that a summons to the parliaments of 1283 and 1290 both did and did not create hereditary peerages. Some peers sit in the house of lords by a title which the house of lords itself has declared invalid in the case of other claimants. At one time the title was tenure by barony, at another writs of summons, and at a third creation by letters patent. Most peers sit in the right of their fathers, but others have sat in the right of their mothers, and a few in the right of their wives or of their sons. There are many peers who cannot sit in the house of lords, and some of the lords who do sit are not peers. Some sit because they are elected by their fellow-peers, some because they are elected by episcopal chapters on the nomination of the crown. Some are elected for life, some until they resign, and some for a single parliament. Some have been born peers, some have achieved peerage by various means, including purchase,[1] and others

[1] James I instituted a regular tariff: £10,000 for a barony, £15,000 for a viscountcy, £20,000 for an earldom (Pike, p. 355).

have had it thrust upon them. Almost every principle upon which the house was founded has been inverted during its construction; and, whatever may be its defects, neither its history nor its composition is lacking in variety.

In an earlier chapter an attempt has been made to trace the evolution of peerage and the process by which the peers sought to monopolize power in the king's council, to convert it into a council of magnates and, when it sat in parliament, into a house of peers. The process has been as prolonged as the growth of the constitution; it was not finished at the close of the middle ages, and the latest steps towards completing the hereditary character of the house of lords were not taken until the nineteenth century. It is a house of lords, but the lords are not all hereditary, and it is not yet a house of nothing but peers who are. Fortunately or unfortunately, its case is one of arrested development; and the changes that threaten in the future are likely to be in the direction of reversion to its original type, at any rate to the extent of reducing or eliminating the principle of peerage which was superimposed upon the council in the later middle ages. For that, if for no other reason, the history of the peers in parliament is of immediate interest.

The fundamental change in the house of lords has been its conversion from the king's great council, sitting in parliament in virtue of royal writs, into a body of legislators basing their right to legislate and their independence of the crown upon the principle of primogeniture. As early as 1346 a distinction had been drawn between the councillors and the magnates in the great council in parliament.[1] Judges, for instance, were summoned to treat with the king and others of his council; other councillors, who eventually come to be known as peers, are summoned to treat with the king, *prelatis, proceribus, et magnatibus*. The distinction was not reflected in the designation of those who sat *in camera magni consilii vocata le parlement chambre;* they were all called "seigneurs" or "lords," and the term included the coun-

[1] Elsynge, pp. 25–7; Hale, *Jurisdiction of the Lords*, ed. Hargrave, 1796, p. 25; Baldwin, p. 76; Pike, p. 247.

cillors as well as the prelates and magnates. A knight might well be a lord of parliament.[1] But the differentiation grew with the increasing stress on "peerage," although peers and peerage are not words found in parliamentary records of the early Tudor period. Nowhere, indeed, in the sixteenth century do we find any clear statement of peerage theory, and Cowell, in his *Interpreter* (1607), vaguely defines the peers as those whom the king summons by special writ to parliament. The anarchy of the Wars of the Roses and the authority of Henry VII militated against the enunciation of a constitutional doctrine; both conditions rendered a right to sit in parliament of little practical value. It was not until parliamentary struggles superseded the arbitrament of war and the autocracy of the crown that a seat in the house of lords became an object of desire and a means of political power.

Henry VII was thus left to do much as he liked in the parliament chamber. Opposition which had not been settled at Bosworth had recourse to conspiracy and rebellion; and the futility of parliamentary opposition freed Henry from any temptation to interfere with traditional methods of summons. Lords who might have resisted in council had already committed themselves to treason and been disposed of by more drastic methods than the refusal of writs. The same conditions obtained in the early years of Henry VIII; and it was not until a momentous revolution in domestic politics was broached that fundamental divergence of view led the crown to consider its constitutional ways and means of success. The first indication of the coming crisis was connected with that famous controversy between the church and the laity which arose over Richard Hunne's case in 1515;[2] and in that year the judges, acting as interpreters of the constitution, declared that the presence of the spiritual lords was not essential to parliament.[3]

[1] Cf. *Lords' Journals*, vol. i. p. xxvi.: "every other knight, not being lord of the parliament."

[2] See Miss Jeffries Davis in *Engl. Hist. Rev.*, xxx. 477.

[3] Pike, p. 327; *Letters and Papers of Henry VIII*, vol. ii. pt. i. Nos. 1313–14.

Meanwhile practice had crystallized, and Henry VIII was too prudent to attempt to enforce the constitutional doctrine of his advisers in this respect. Nor did he interfere with the routine of chancery in issuing special writs of summons; the fact that chancery continues to issue such writs to the law officers of the crown, which have not been obeyed for centuries, suggests that Henry was wise to leave its practice alone. Occasionally he seems to have sent a private intimation to a lord that he would do well to refrain from coming to parliament; and when they wanted to abstain they had, of course, to seek his permission. But the regular writs were issued as though the crown had no option in the matter, and the only method Henry took to modify the *personnel* of the house of lords was the creation of peers. The dissolution of the monasteries materially altered the composition of the house, but that was not the object of their suppression. The Italian and absentee bishops of Salisbury and Worcester were deprived by statute,[1] there being no means by which the church in England could rid itself of the incubus; but the bill was not passed for the purpose of catching votes. It is doubtful, too, whether that was the motive of Henry's few creations in 1529.[2] The Boleyns would in any case have been ennobled, whether their votes were needed or not; and the real question was not how to obtain a majority of lay over clerical votes, but whether any lay majority could legally bind the church in spiritual matters against the votes of its representatives. The critical resolutions were carried, not by a created majority, but by a conference between the two houses, in which the spiritual and temporal peers were equally represented, and the commons voted with the latter. The small number of twenty-eight temporal peers summoned in 1523 was quite abnormal; and even in 1534, when Henry had

[1] *Lords' Journals*, i. 80.

[2] Round, *Studies in Peerage History*, pp. 330, etc. Lord Ogle was not summoned between 1529 and 1544, Darcy was kept away in 1535–6, and possibly Tunstall in 1532; but these instances are too few to justify any generalization, except that the crown's control over its own summons was not quite extinct.

raised the number to fifty-four, they were fewer than the temporal peers summoned in 1454.

The dissolution of the monasteries reduced the number of spiritual peers from forty-seven to twenty-one; and while Henry VIII increased the number of bishops from twenty-one to twenty-seven, the abolition of the papal jurisdiction and of all but the form of capitular election gave the crown substantial control of these votes. At the end of his reign the majority of the existing peers had been created by Henry VIII; but Mary relieved the church in England of its subjection to the crown by subjecting it to the papacy, and the Elizabethan settlement of religion owed nothing of its triumph to royal control over episcopal votes in the house of lords. Her success, however, placed twenty-six spiritual peerages at her disposal, and these, with half a dozen temporal creations, made the house of lords as safe in her keeping as a pocket borough. At her death the temporal peers numbered sixty, and the house of lords contained eighty-six members, which was slightly less than its average size since 1350; only during Henry VII's reign and the early years of Henry VIII had the number sunk below eighty, and the difference lay in the reduction of the spiritual peers from more than half to less than a third of the whole house.

It was the Stuarts who, in seeking to control the house by creations, rendered it uncontrollable. No doubt it was inconvenient for James I to inherit a house of lords consisting of eighty-six members, none of whom he had created. The bishoprics, of course, gradually fell into his hands, and by creating fifty-four peers he nearly doubled the temporal peerage, but failed to make it amenable.[1] On the eve of the Scottish Union the temporal peers numbered a hundred and seventy-six; that act added sixteen, the Tories created twelve to pass the treaty of Utrecht, and these, with the bishops, endowed the House of Hanover at its accession with an upper house of two hundred and thirty. Nevertheless the younger Pitt was the only begetter of the Victorian

[1] See *Deputy-Keeper of the Records 47th Report*; Pike, pp. 357 *sqq.*

house of lords. Owing partly to the Irish union, but more to Pitt's desire to enlist support among the *nouveaux riches* of the war and the industrial revolution, the peerage had been more than doubled at the time of his death.[1] It almost rivalled in size the house of commons, and counted over five hundred members. The policy of control by creation had clearly reached its limit, and the house of lords was independent at last. For the first time in its history it contained, in the nineteenth century, an overwhelming majority of members who had been born, and not created peers. During the middle ages the spiritual peers, who were not hereditary, always outnumbered their temporal colleagues. The bishops, new creations, and their friends among the old enabled Elizabeth, the Stuarts, and even Pitt, to counterbalance hereditary independence; and the sons of Pitt's house of lords were the first generation of peers by primogeniture to be undisputed masters of their own house. It was not a mere coincidence that that generation brought the country to the verge of revolution in 1832. The hereditary principle is not the rock upon which the house of lords was founded, but the rock on which it foundered.

The multiplication of the size of a council six- or sevenfold involved a radical change in its functions and composition; and the house of lords became less and less a council, less and less judicial, less and less a body to get things done, and more and more an opposition. A body of six hundred men can hardly be more than a public meeting, and both houses of parliament are now, in fact, public meetings which do most of their useful discussion by way of private conversation. The difference is that while the house of commons is a public meeting of plenipotentiaries, the house of lords is a public meeting of private persons with very unequal qualifications for the discharge of their

[1] It has been nearly doubled again since 1806, and 433 new peerages were created between 1880 and 1920. The total membership of the house of lords is now approaching a thousand; and the original proportions of ecclesiastical, and representative Scottish and Irish, peers to those of the United Kingdom, have entirely disappeared.

public duty. The best apology for the house of lords as a political authority is the fact that for five-sixths of its business it consists of less than one-sixth of its members; but it is a precarious title, which depends upon the non-user of rights by the great majority of their proprietors, and the house of lords is a serious drawback to the advantages of allowing a constitution to grow, instead of constructing it on a plan. It does not represent any conscious design, and it would never have entered into the mind of man to construct a second chamber on the principles which it is presumed to embody.

The original obligation out of which it grew was the liability of tenants who held land from the crown to render suit and service at the king's court. The service was of value because it was largely military, and great holders of land were in a better position than others to provide armed forces. But the advice that was also expected would be expert, because in the middle ages the management of England was a problem akin to that of the management of the domains which the tenants-in-chief possessed. A peer like Thomas of Lancaster, who held five earldoms, might be presumed to enjoy the practical experience which would make his advice of value to the crown. But the crown also possessed the right of selecting, by special writ of summons, the tenants-in-chief whose advice it valued and desired; and it was not from among them exclusively that kings formed their council. Others were included for legal skill not possessed by the barons, and later on there were added men of commercial experience and political wisdom, as English policy grew more complex and embraced multifarious interests. The holders of land were, however, entrenched in the council, and gradually the breach was widened between baronial councillors, whose point of view was local and territorial, and those new men who depended on the crown, and viewed politics from the centre as royal or national business. This divergence differentiated the great from the privy council, and left the former in parliament as the embodiment of the landed interest; it was on

questions relating to the tenure of land that the *magnum concilium* claimed and secured the decisive voice, and it was the policy of strict entails, designed to preserve the integrity of great estates, that led to the recognition of primogeniture as the main title to a seat in the house of lords. This development was but slowly affected by the growth of industry and commerce, because the wealth derived therefrom was so largely invested in land that the interests of the two classes always tended to coincide, and wealth in land continued to be the basis of the house of lords; indeed, one of the motives of the dissolution of the monasteries was to provide new lands for the *nouveaux riches*, and many of our ducal houses were founded on the spoliation of the church.

Wealth in land and wisdom in council are not, however, synonymous terms, and the conciliar character of the house of lords was obscured by the peerage. While the house asserted with growing emphasis its claims as a strictly hereditary peerage, it clung tenaciously to powers it had possessed as a council; and its history for some two centuries has consisted mainly of struggles to retain rights of jurisdiction and legislation which were growing more and more anomalous. Most of the privileges of the house came to it in its capacity as a royal council; and as recently as the Act of 1876 appeals to the house of lords were described as being heard "before her Majesty the Queen in her Court of Parliament." [1] But the sovereign had gradually been deprived of all discretion in determining the composition of his court and council in parliament. In the Bristol and Arundel cases, in the reign of Charles I, the lords declared that a writ of summons could not be refused to a peer, and that the king could not prevent him from obeying it.[2] At

[1] Pike, pp. 268, 306.

[2] Gardiner, *History of England*, vi. 91–115; Hallam, i. 379–80; *Lords' Journals*, iii. 544; Elsynge, pp. 59–60, 192–242. As recently as 1601 Elizabeth had afforded a precedent for Charles I by directing Rutland, Bedford, Cromwell, Sandys, and Montague not to appear in parliament although writs of summons had been sent them (*Acts P.C.* 1601–4, pp. 218–19, 221).

the Restoration they re-affirmed the inalienable right of peers to their seats, while they repudiated all the medieval principles from which those rights were deduced. They abolished all feudal services, of which attendance at the king's court was one;[1] they decided that the possession of a barony, the original ground for the exercise of jurisdiction, constituted no right to a peerage;[2] and they denied their obligation to obey the royal summons to parliament, while claiming the right to come if they chose.[3] All conception of duty was merged in privilege; and, taking a leaf out of the Stuart note-book, the lords grounded their privilege on indefeasible hereditary right. Peerage became indelible save by attainder; no misdemeanours and no incapacity could deprive a peer of his dignity; and the Revolution of 1688 left the peerage in possession of rights which it denied to the crown. The peer might, indeed, be excluded from parliament for his faith or misconduct, but he did not thereby cease to be a peer.

The claim of a body of landlords to be the highest court of appeal over the whole complicated sphere of civil jurisdiction was the most singular of the anomalies arising from the simultaneous retention by the lords of the powers of a council and their repudiation of the principles on which it was constituted. Edward I's "parliaments of the council" had been held to determine the law's delays and the judges' doubts, matters which were commonly settled after the barons and elected commons had departed; and the sentence of the high court of parliament was that of the king in council. As late as the reign of Henry VII the judges are the exclusive arbiters of this jurisdiction; but

[1] Pike, pp. 356–7.

[2] In the Fitzwalter case (1669), reaffirmed in the Berkeley case (1861). The principal ground for this decision was the reasonable argument that a "barony" was devisable by will, and that if peerage attached to a barony, and a seat in the house of lords to a peerage, the holder might dispose of political power by sale or by bequest. The objection did not lie against the medieval tenure by barony, because the tenant could not then dispose of lands which belonged to the crown.

[3] Disobedience to the royal writs of summons became common form with the peers as time went on, and no king since the Restoration was in a position to impose the penalties for dereliction of duty which had been regular in the middle ages.

by the middle of the nineteenth century the peers had turned the council so topsy-turvy that not only had they arrogated to themselves, a non-judicial body, the supreme decision on points of law, but they had reduced the real lawyers to assistants and advisers. The history of this blue-blooded revolution requires a little attention.

No doubt a claim to jurisdiction seemed natural to a baron; for a barony in the middle ages consisted largely in the jurisdiction and profits therefrom which it implied. But a barony was valued by its medieval possessor, not for the opportunity which its courts afforded him of displaying legal wisdom, but for the emoluments which accrued from the dispensation of justice; it was the lord's steward who judged, while his master received the proceeds of judgement. Moreover, the king, as lord paramount of the land, occupied in the high court of parliament the same position of privilege that the baron held in his baronial franchise; and the only right the barons possessed in the king's court was to be tried by their peers, not to try other people. When Edward I made parliament the common receptacle for his subjects' petitions, it was to himself and his judges in council, and not to a public meeting of peers, that he provided access. The commons, however, having sifted the petitions and made the important ones common, took to the practice of referring the rest to the council and departing without a reply. Presently direct access to the council, and through the council to chancery, by means of bill or petition, was accorded by statute; the stage of reception and reference by parliament to the council was omitted, and from the reign of Henry IV original jurisdiction in parliament rapidly decreased.[1] The petitions which had flowed in thousands to parliament were diverted to chancery, the courts of star chamber and requests, and other departments of the council. This was a characteristic feature of the Tudor period, and during the first seventeen years of James I's

[1] Hale, *Jurisdiction of the Lords*, ed. Hargrave, 1796, p. vi; Palgrave, *Report on Public Petitions* (Parl. Papers, 1833, xii. 19); McIlwain, p. 133; Nicolas, *Proc. of Privy Council*, i. 73, v. p. xi; Leadam, *Star Chamber* (Selden Soc.), i. pp. xxiii–iv, lix–ix; Baldwin, pp. 243–9.

reign there is said to have been only one writ of error brought before parliament.[1]

Dissatisfaction, however, with the uses to which the Stuarts put the jurisdiction of their prerogative courts led to a demand for its revival in parliament; and the popularity of the impeachment of Stuart ministers afforded the lords an easy re-entry. But in the interval the lords had converted the king's council in parliament into a house of peers, and under the guise of restoration a supreme appellate jurisdiction was vested in men the like of whom had never possessed it before. The commons, indeed, were not quite content with this restoration; they wanted a place in the sun of parliamentary jurisdiction, and a grand contest of legal wits was waged over the question whether or not the commons were judges in parliament.[2] Their distrust of the Stuart judges distorted their history and precluded a real restoration; and they had in the end to be satisfied with the part of the grand inquest of the nation, presenting offenders against the state for the judgement of the peers. From this jurisdiction, which was of first instance with the commons as prosecution, the lords proceeded, in the reign of Charles II, to claim an appellate jurisdiction without any intervention of the commons. The abolition by the Long parliament of the prerogative courts, to which the council had delegated much of its jurisdiction, had left a void in that sphere which the common law courts could not fill; and the peers stepped into the breach. Their

[1] Elizabeth had provided in 1585 for the hearing of writs of error from the queen's bench in the exchequer chamber when parliament was not sitting.

[2] Floyd's case in 1621, in which the Commons inflicted severe penalties on one who was not a member of their house, is well known (Gardiner, iv. 119–21; Hallam, i. 360–2), and is supposed to have been unprecedented. But in 1529 Henry VIII writes to Lady Worsley forbidding her to molest any further a clerk accused of attempting to poison her husband, "as the House of Commons has decided that he is not culpable" (*Letters and Papers*, iv. 5293, v. 117; his case had apparently been brought up from king's bench to parliament on a writ of error); and the house, before passing the bill of attainder against Thomas Seymour in 1549, resolved that it would hear the evidence "orderly as it was before the Lords" (*Commons' Journals*, i. 9), though the answer was that it was not necessary in that "court." Each part of the high court of parliament was claiming to be a whole.

assumption was not unchallenged, but the commons were engaged upon a similar assumption in the sphere of finance; and when the peers asked for records establishing the monopoly of supply claimed by the commons, the lower house retorted with a similar demand for the evidence upon which the lords based their assumption of appellate jurisdiction. Both houses were, in fact, appropriating the effects of a languishing monarchy, and they agreed to divide the spoil. The divergence of parliament into two houses prevented the common enjoyment of the fruits of parliamentary triumphs; and the lords acquiesced in the commons' control of taxation, while the commons accepted the claims of the lords to the sole exercise of appellate jurisdiction.

The subservience of the judges to the Stuarts relieved the peers of any sense of obligation to share with them their newly-won powers; and the position of the judges in the high court of parliament grew steadily worse. Having been limited to judicial functions, they were reduced even there to giving advice; then their advice was rejected, and at length, in 1856, the peers refused to consult them.[1] The revolution had reached its limit when the supreme court of appeal refused to consult the judges, whose presence alone gave a shred of historical and moral support to the claims of the peers; and the judges soon had their revenge. The mere pressure of public opinion drove the peers from the position they occupied, and no peer who neither holds nor has held high judicial office under the crown now ventures to sit when the house of lords is acting as a supreme court of appeal. The efficiency of the house of lords in its judicial capacity depends upon the rigorous abstention from its proceedings of every peer who owes his position to primogeniture; and so far as jurisdiction is concerned, the peers have abandoned the hereditary foundation of their house.

This abdication was not without awkward logical consequences, and the question arose why primogeniture should qualify peers to make the laws which it did not qualify them

[1] Pike, p. 377.

to interpret. The question was emphasized by the increasing stress laid by the peers upon peerage as the sole qualification for membership of their house. The judges were not the only victims of this exclusive principle; one by one the non-hereditary and conciliar elements were excluded even from the subordinate position of advisers to the house. The serjeants-at-law have been abolished; the law officers of the crown and the masters in chancery have ceased to attend, and privy councillors are reduced to standing on the steps of the throne, where they may be seen, but may not be heard. The lord chancellor and other great officers of state have only been retained by the practice of forcing upon them the livery of the peerage; and the bishops alone remain to testify that a reputation for wisdom was once considered a necessary qualification for membership of the king's great council in parliament. Even they have suffered. They have been denied the status of peerage, notwithstanding their assertion in parliament in 1352 that they were peers for precisely the same reason as earls and barons;[1] and the grounds for this astonishing denial are worthy of it. Bishops do not inherit their bishoprics, but attain them by merit; and if they commit treason or felony, they are not tried by the peers.[2] The house seems to have based itself on the reason for which Palmerston approved of nomination for the civil service: "there was no damned merit about it." The bishops survived this attack on their dignity, but not without loss. Their number had been reduced to comparative insignificance by the enormous creations of temporal peers, and they formed but a twentieth part of the house in the nineteenth century. But the possibility of increasing this exiguous figure alarmed the temporal peers or their nonconformist supporters; and in 1847[3] it was enacted that, however much bishops might multiply, their seats in

[1] See above, p. 65. This principle had been laid down in the Constitutions of Clarendon: "archiepiscopi, episcopi . . . habent possessiones suas de domino rege sicut baroniam, et inde. . . . sicut barones ceteri, debent interesse curiæ domini regis cum baronibus" (c. xi).

[2] The reason, of course, was that in the middle ages the prelates had claimed the higher privilege of being tried by spiritual men in the ecclesiastical courts.

[3] 10 & 11 Vict., c. 108; Makower, pp. 211–12.

the lords should never exceed twenty-six. The two archbishops and the bishops of London, Durham, and Winchester [1] are always members of the house, but the rest have to wait until the chances of seniority entitle them to rank with those whose wisdom comes by birth.

Logic is not perhaps an important ingredient in political institutions, but defiance of logic has been carried to extremes in the house of lords. It claims to be founded on right, but it has made havoc of that right by its own resolutions. Episcopacy entitles some, but not other bishops to sit; peerage entitles a peer in England to sit, but not one in Scotland or Ireland, unless he is also elected. The crown could create as many peers in perpetuity as it pleased, but it could not, until 1887, create a single peer for life.[2] It could "ennoble" a man's blood and limit its flow to eldest sons; but it could not exert discretion in the sending out writs of summons which no one else could issue. Inasmuch as no mention was, naturally, made of heirs in the writs of summons by which peers were first begotten, the house of lords has presumed that descent was intended to heirs-general, whereas when descent is first suggested in the creation of peers by letters patent, it is only to heirs male; so that the heirs of a man who was never intended to have a hereditary peerage are better provided than those of one who was. The house of lords is not, in fact, founded on any principle; its basis is a patchwork of legal fictions, inconsistent rights, illogical decisions, and palpable absurdities. It represents an attempt to reduce the variant ideas and conditions of different ages within the compass of a legal formula, and to erect that formula into an absolute right defined and definable by its possessors alone.

That autonomy claimed by the peers has fortunately never become the law of the land; and their attempts to

[1] These three bishoprics are given precedence over the others by 31 Henry VIII, c. 10.

[2] The Appellate Jurisdiction Act of 1876 gave the crown power to create two lords of appeal in ordinary, and to summon them to sit and vote in the house of lords so long as they fulfilled their judicial functions; in 1887 this period was extended to the term of their lives.

limit by statute the crown's power of creation have always been defeated. The crown cannot, it is true, create more than a limited number of Scottish and Irish peers; and it cannot create any English peers (as distinct from peers of the United Kingdom) at all. Nor can it add to the number of bishops in parliament. But these restrictions on the peerage have little reference to the composition of the house of lords. No creation of Scottish or Irish peers would add to the number entitled, by the respective acts of union, to election as representative peers; and there are obvious limits to the erection of episcopal sees. More serious was the peerage bill, which was passed by the lords in 1719, and only thrown out by the commons on a division after a masterly speech by Walpole. By one of the ironies of history the Tories had, in 1712, provided the only precedent for the creation of peers with the express purpose of carrying a bill in the house of lords; and the Whigs in 1719 attempted to make its repetition impossible by providing that the crown should never create more than six new peers at a time. It has been thought that the success of the peerage bill would have prevented reform; it would certainly have promoted revolution, from which the country was only saved in 1832 by the power of the crown to create in the last resort sufficient peers to override the opposition of the house of lords. The crisis recurred in 1911 in the same form; and the same arguments and even the same phraseology were used as in 1832.

The problem of the house of lords has been complicated by the fact that peerage has from first to last been a social, rather than a political question, and its intrusion into parliament was as much an anomaly as the attempted intrusion of an estate of merchants in the fourteenth century. From the sixteenth century onwards no statesman gained politically by translation from the house of commons to the house of lords; and from Walpole's time a seat in the house of lords has been regarded as a positive drawback to political ambition. Front-rank politicians only accept promotion to it as a sacrifice in the interests of

their party, as an easy stage on the road to retirement, or as social gilt for a vice-royalty or dominion governorship. It is for its social, rather than for its political attractions that a peerage is sought, and it is sought most keenly by those who feel the need of social status. The few instances in which it has been used as a reward for distinguished service, as a means of providing for the conduct of the business of liberal governments in the house of lords, or as an expedient to secure a place in parliament for wisdom which shrinks from the turmoil of popular election, are only exceptions to the general rule. The political responsibilities which once attached to peerage are commonly evaded; the work of the house of lords is done by a tenth of its members; and the abstention of the rest is as much a political portent as was the avoidance of parliament by the great majority of abbots during the later middle ages. Whatever form the reconstruction of the house of lords may take, it would be well to guard against a political trust being treated as a means of social gratification.

Meanwhile the house lingers on under sentence of death. The preamble to the parliament act of 1911 held out a promise of reconstitution of which more urgent affairs have postponed the fulfilment; and the party truce following on the war precluded discussion of even the principles of reconstruction. One or two points are, however, almost beyond the stage of debate. It has been pretended that the principle of primogeniture could not logically be excluded from the house of lords and retained in the monarchy; and it is true that, if the political claims of the crown and the house of lords were identical, the principles which determine their position could not be divorced. But the Stuarts were ejected from the throne because they clung so tenaciously to what they regarded as their hereditary rights, and the crown has remained hereditary only because it has abandoned its veto on legislation. Had the house of lords practised a similar self-restraint, its hereditary basis would have been equally secure.

Such inactivity would have been the negation of what the

house of lords considers its proper function as a second chamber. The difficulty is that political powers, even those of a second chamber, cannot be divorced from responsibility, and hereditary right is incompatible with responsible rule. That is why James II fled to France in 1688 and the peers were compelled to pass the parliament act in 1911. No second chamber which claims a right of veto can nowadays be based on anything but popular election. But a second chamber may be very useful without merely obstructing the work of the first; and there is ample scope in modern legislation for revision, suggestion, and amendment without the right of rejection. Such work might well be done by a non-elective body of experts, whose advice would be welcomed so long as it was not given by way of dictation. Nor is it indispensable that the two chambers of parliament should both cover the same and entire field of activity. One of the old distinctions between council and parliament was that the council could regulate foreign relations, while parliament controlled domestic affairs.[1] The house of commons is little adapted for the work of diplomacy; and foreign policy is, as a matter of fact, settled by agreement between a few politicians on the two front benches. The committee of imperial defence is a more formal expression of the same political necessity; and there seems no adequate reason why these two functions should not be associated with a small and efficient second chamber. It is not essential to the maintenance of the party system that party lines should overrun the whole field of domestic, imperial, and foreign politics; and some discrimination is inevitable if the common sentiment, which pervades the British realms and transcends their party divisions, is ever to find an organized expression in a common imperial government. Congenital disqualifications have impaired the health of the second limb of the body politic, and it might well be made the subject of an imperial operation.

[1] *Lords' Journals*, i. 56.

CHAPTER XVI

THE COMMONS IN PARLIAMENT

In the middle ages the commons only appeared "in parliament" with the Speaker at their head, and save for his orations they were dumb. To-day when men talk of parliament, in nine cases out of ten they are thinking of the house of commons; and to say that the house of commons wields nine-tenths of the sovereignty of parliament is an under- rather than an over-statement of the truth. This predominance is almost entirely the result of growth during the last four centuries; for, in spite of the idealistic pictures drawn of the constitutional progress of the commons during the fourteenth century, their position at the end of the fifteenth was precarious, and there seemed no obvious reason why they should not fall into the same condition of impotence or abeyance as third estates in France and Germany, the Netherlands and Spain. Not only did parliaments grow less frequent,[1] but the number of members showed an alarming tendency to shrink, and whereas Edward I summoned 322 representatives of cities and boroughs, Henry VI in 1445 summoned but 198.

The deductions which have been drawn from the writs of summons and the returns thereto [2] may, however, be wrong in this respect, as they certainly are with regard to the size of a medieval house of commons. Just as there was many a slip between judgement and execution, so there was a considerable hiatus between a member's return in the sheriff's writ and his bodily presence in parliament; and an

[1] See above, p. 131.
[2] *Official Return of Members of Parliament* (1878), pt. i.

examination of other records suggests that the members elected were regarded merely as a panel from which a far smaller attendance was actually secured. These other records are the writs *de expensis*,[1] which members who did attend sued out to recover their wages and their expenses from their constituencies. They are careful documents, giving the exact number of days during which members served on their journeys and at Westminster, and the sums vary with the distance from London of the different constituencies. A comparison of the details they provide with the official return of elections reveals a startling discrepancy. The number of members "returned" to a fourteenth-century house of commons was over three hundred; the number of those who actually attended, according to the writs *de expensis*, was seldom a hundred, and never more than a hundred and thirty. To these the shires contributed their regular seventy-four—two knights for each of the thirty-seven shires; but the cities and boroughs whose names occur during the fourteenth century vary in number from five to twenty-four.

It might be thought that these writs, as entered on the close rolls, are defective, that many burgesses were too proud and independent to claim their wages, and that their numbers may have been far larger than these writs indicate. But there are no voids in the writs obtained by knights of the shire, and if these landed gentry were not too proud to claim their wages, the business-like burgesses can hardly be credited with contempt for such considerations. London and York, it is true, made their own arrangements for feeing their members without recourse to these writs, York paying its members double the usual rate;[2] and a similar arrangement may account for the absence of Bristol, Winchester,

[1] These are entered on the Close Rolls, which have now been calendared for nearly the whole of the fourteenth century.

[2] Davis, *York Records*, p. 15; on p. 138 the York members are described a "citizens and knights of the parliament for this honourable city and shire." On June 6, 1483, Richard III ordered four members to be returned for York, and four were elected, contrary, says Mr. Davis, to all precedent.

Salisbury, Southampton, Norwich, and Yarmouth from the writs *de expensis*. The Cinque Ports also do not figure in them; but although summoned from 1295 they apparently made no return until 1366, and a return to the writ is no proof of actual presence at Westminster. When we find Oxford, Canterbury, Newcastle, Hull, Cambridge, Northampton, Nottingham, Portsmouth, Lincoln, Leicester, Gloucester, Derby, Bedford, Rochester, Southwark, Warwick, Worcester, Exeter, Ipswich, Shrewsbury, Stafford, and Carlisle among the cities and boroughs to which writs *de expensis* were addressed, it is difficult to discover more than half a dozen constituencies to put with London, York, and the Cinque Ports, as making their own arrangements and thus adding largely to the numbers given in the writs. Save for these exceptions those writs may be taken as a fairly accurate indication of the size of the house of commons.

On their showing the fullest house of commons in the fourteenth century was in the famous Good parliament of 1376. But even then only twenty-two cities and boroughs appear on the writs *de expensis;* and the addition of London, York, and half a dozen others would bring up the total attendance to 134 members, sixty from the cities and boroughs, seventy-four from the shires. It is perhaps significant that the parliament which most nearly equalled these numbers was that of 1311, when a similar attempt was made by the lords ordainers to restrain the crown. Twenty-one boroughs on that occasion received writs *de expensis;*[1] but on no other occasion during the century did the number exceed twenty. There were eighteen in the parliament of February 1371, sixteen in that of 1362, fifteen in 1351 and 1358, and thirteen in 1352 and 1357. In other years the figure descends to eleven, nine, eight, six, and five, six being the most frequent number. After the Good parliament there is some improvement in numbers and a great increase in regularity; and in the six succeeding parliaments[2] the boroughs receiving writs *de expensis* were never fewer than

[1] *Cal. Close Rolls*, 1307–13, p. 440; Tout, *Edward II*, pp. 89–90, 104.
[2] 1377 (two parliaments), 1378, 1379, 1380 (two parliaments).

eleven nor more than thirteen. But these cities and boroughs are not by any means the same. Thirty-eight boroughs in all appear in the writs for one or more of these six parliaments; but Oxford alone is represented in all. No other borough appears in more than four of these parliaments; nineteen of them send representatives only to one, and ten only to two, though the attendance from cities and boroughs, which made their own bargain with members, was probably far more regular.

These figures explain some familiar facts and suggest some novel reflections. They help to account for the predominance of the knights of the shire in the medieval house of commons, and for the fact that the house of commons—*domus communitatum*—really means house of the shires. When seventy-four knights were regularly present, and the number of burgesses varied from sixty to twenty-six, numbers and regularity of attendance combined with social superiority to give the knights control of the house. They also explain how the house found room for its sessions in the chapter house of Westminster abbey. But more important is the light they throw on the position of medieval parliaments. Reluctance to attend was not an isolated phenomenon, but a general and successful attitude. Constituencies accepted taxation to which their absence gave consent, rather than send and pay members to protest; and only in imagination can medieval parliaments be regarded as representative of a nation. They were mere representative specimens, and aloofness from national affairs, rather than participation in them, was the characteristic of the age. We have thus to alter the perspective in our views of constitutional development. The activity of parliaments from the middle of the fourteenth to the middle of the fifteenth centuries was transitory and unsubstantial; it was due to the weakness of the monarchy and the factions of the peerage, and was not based upon any broad national ambition for self-government or sense of political responsibility. Political consciousness was active among the landed gentry of the fourteenth century, and the petitions of the Good parliament

express their ideas as Magna Carta does those of the greater barons. But middle-class politics could not develop until far more than a score of cities and boroughs would trouble to send their spokesmen year in and year out to Westminster; and the Lancastrian Fortescue who wrote at the end of the period has nothing to say of the constitutional importance of the house of commons.

It was a slow growth, and its birth must be connected with that general stirring of national impulse in English bones of which Wycliffe, Langland, and Chaucer were some of the exponents. A desire for self-expression in English language and literature was followed by a desire for self-expression in English politics; and the generation which saw the founding of schools like Winchester and Eton, and a dozen colleges at Oxford and Cambridge, also witnessed the beginnings of a political efflorescence.[1] It was not a renaissance, for there is no evidence that the lower classes in England had ever desired expression before; their legal designation was "cattle," and it is probable that that was a truer description than our romanticists would have us believe. It is assumed rather than proved that the mass of these "chattels" were baptized in the early middle ages or regarded as having souls of their own. The peasants' revolt of 1381 is their first expression in politics, and it did not stand alone. The Lancastrian statutes limiting the country franchise to forty-shilling freeholders are only intelligible on the assumption that villeins had begun to undertake an attendance at county courts which their betters had thought a burden. Municipal and even national records were beginning to be kept in a language they understood, and their economic emancipation was followed by their intrusion into politics.

Only, of course, a minority of villeins rose to reinforce the freeholders and stimulate the middle class; but it is at one of the lowest ebbs in English politics, the middle of Henry VI's reign, that we can trace the beginning of the flow of popular interest in politics. The writs of summons to parliaments issued by Edward I had been

[1] See above, p. 157.

admonitions from above; and the inertia of the mass to which they were addressed caused a steady decline in their number. But about 1445 the tide begins to turn. Hitherto the desire had been to escape the burden of representation, but now new boroughs begin to send members to parliament, and within a generation the number of burgesses returned rose from 198 to 224. The number of new boroughs created in Wiltshire suggests a connexion with the growth of clothing towns in that county. More marked was the growth in actual attendance; and within a century the miserable two or three score of borough members who had feebly supported the knights of the shire had swollen to some two hundred or more.[1] In 1533 a borough member was for the first time elected Speaker of the house of commons,[2] and from the reign of Henry VIII there is no discernible distinction in dignity or influence between a knight of the shire and a borough member. Thomas Cromwell sat for Taunton and William Cecil for Stamford, though doubtless the eminence of these borough representatives was due to the weakness of feudal, and strength of monarchical, influence in the boroughs as well as to the growing political weight of the middle classes.

The house of commons had become a place of importance. In 1455 the Duchess of Norfolk had written of the need of securing the election of members who belonged to her husband and were his "menial servants."[3] But it was Henry VIII who thrust the house of commons into political prominence. Before 1529 there is hardly a reference to its proceedings in the dispatches of any foreign diplomatist or

[1] The figures given by contemporary writers are always grossly exaggerated. In 1549 the privy council itself speaks of nearly four hundred members being present in the house of commons (*Acts of Privy Council*, ii. 260); but the recorded divisions in the house seldom reach three hundred votes in the sixteenth century. On 19 April, 1554, however, 321 members took part in a division, and in 1555 the bill to restore firstfruits and tenths was carried by 193 to 126 votes; in 1593 the commons agreed with Bacon's views on the financial relations between the two houses by 217 to 128 votes, and this would appear to have been the biggest division in Tudor times.

[2] Humphrey Wingfield, M.P. for Yarmouth. T. Williams, Speaker in 1562–3, was M.P. for Exeter.

[3] *Paston Letters*, i. 337.

observer; from that time onwards the correspondence of French, Venetian, and Spanish ambassadors becomes one of the main sources of parliamentary history, and papal nuncios and imperial envoys vie with one another in trying to influence its decisions. With nearly half the peers, and at least four-fifths of the clergy against him, Henry had need of the house of commons, and he cultivated it with sedulous care. The commons had always been the main source of petitions to the crown, and it was an obvious tactical advantage if Henry's desires could come before the lords of the council in parliament in the guise of petitions or bills from the commons. It would appear from Lord Darcy's complaint in 1536 [1] that the lords had developed the practice of securing from the masters in chancery copies of bills and petitions before they were read in the commons, and even of pronouncing on their admissibility. This practice was now discouraged, and henceforth Tudor and Stuart sovereigns used the Speaker, and not the lords of the council in parliament, as the medium for expressing their views on the propriety of bills which members sought to introduce. It was to the interest of the crown to shift the balance of legislative power from the lords to the commons; and in 1536 the Speaker is first recorded to have asked for access on behalf of himself and of his colleagues to the king in person.[2]

The result was an enormous increase in the prestige of the lower house. Its domestic proceedings had never appeared on the rolls of parliaments, but in or soon after 1547 [3] it began to keep *Journals* of its own. The eldest sons of peers thought it becoming to seek election; [4] magnates

[1] *Letters and Papers of Henry VIII*, xii. pt. i. 410; Dodds, *The Pilgrimage of Grace*, 1915, i. 360.

[2] *Lords' Journals*, i. 86, 167; Elsynge, p. 176.

[3] The extant *Journals* begin with 1547, but probably the record was not compiled until later in Edward VI's reign.

[4] Two of the earliest instances were Francis Russell, eldest son of the first Earl of Bedford, who was M.P. for Buckinghamshire 1544–52 (*Commons' Journals*, i. 15), and Francis, eldest son of the second earl, who was M.P. for Northumberland in 1572. Cf. Sir R. Bagnal's request for a seat to the Earl of Rutland on the ground that he wanted "for his learning's sake to be made a parliament man" (*Rutland MSS.*, i. 207).

bought up boroughs to provide themselves or their friends with seats, and were besieged with applications for their influence. Candidates began to pay, instead of being paid for election.[1] Boroughs which had let their representation fall into abeyance sought for its restoration, and those which had never had writs began to seek them.[2] Lawyers and other aspiring politicians went about looking for seats, and the obligation of residence was ignored in spite of the rejection by the house of commons of a bill to relax it in 1571.[3] Parliament was providing a career, and in Elizabeth's reign we hear for the first time of some one being a "great parliament man"[4] who was not a member of the privy council. A score of members in Elizabeth's reign made names for themselves throughout England by what they said and did in the house of commons.

The growth of the house of commons was reflected in the expansion of its numbers, the increase of popular interest in elections and in the proceedings of the house, and in the development of its privileges and powers. Wales, Cheshire, Berwick, and Calais were brought within the sphere of parliamentary representation, and the creation of new boroughs was slightly, if at all, due to the crown's desire to pack the house. Under Henry VII and Henry VIII forty-five new members were added, under Edward VI thirty, under Mary twenty-seven, and under Elizabeth fifty-

[1] The first known case of bribing electors occurred in 1571, when Thomas Long, "being a very simple man," gave the mayor and another citizen of Westbury £4 to secure his election (*Commons' Journals*, i. 88; D'Ewes, p. 182). No returns have been found for this parliament. The mayor and his colleague in corruption were condemned to restore the £4 to Long and pay £20 to the Queen. Long himself was simultaneously put in the pillory, not for this affair, but for reporting the Queen's death (Hooker's "Journal of the House of Commons" in *Trans. Devon. Assoc.*, xi. 483). In the same session the house was troubled by reports of the bribery of its members (*ibid.*, p. 488; *Commons' Journals*, i. 93). For an attempt to bribe a member in Edward IV's reign see *Trans. Devon. Assoc.*, xlvi. 481.

[2] *State Papers*, Dom. Eliz., xxvii. 23–4; *Commons' Journals*, i. 83; D'Ewes, pp. 156–7, 159. It was owing to the learning and activity of William Hakewill (see *D. N. B.*) that several boroughs recovered their representation.

[3] *Commons' Journals*, i. 84–5; D'Ewes, pp. 160, 168–71; the debate as reported in D'Ewes is of exceptional interest.

[4] *Rutland MSS.*, i. 130.

nine. From 297 members at the accession of Henry VIII the house had grown to 458 by the death of Elizabeth.[1] There is evidence, too, that the number of electors who participated in the choice of their members largely increased, though this is more marked in the county than in the borough elections. In the boroughs the franchise was generally at the beginning of the Tudor period, and it remained to the end, confined to members of the borough council;[2] and it was not until the days of the Long parliament that we find instances, like that of Reading, where the number of electors leapt up from a dozen to over a thousand.[3] At the county elections there were large and tumultuous gatherings,[4] sometimes ending in riots, in proceedings before the privy council, and in disputes between chancery and the commons over the decision of election petitions.[5]

These contests were, perhaps, as much the embers of local faction as the dawn of national politics; and although in Henry VIII's reign members were told to discuss with their constituents what they had seen and heard at Westminster, any instructions given by constituencies to their representatives seem to have been of purely local interest.[6] The idea of deciding questions of national policy by reference to the electors can hardly be traced before 1640; and the parliamentary debates on monopolies at the end of

[1] See above, pp. 162–3.

[2] See my *Reign of Henry VII*, ii. 181–9; Davis, *York Records*, p. 138; W. J. Harte in *Trans. Devon. Assoc.*, xliv. 206, xlv. 409–10.

[3] *Reading MSS.*, Hist. MSS. Comm., 11th Rep. App., vii. 187, 189, 192–4; cf. Guilding, *Reading Records*, iii. 488–9, 507, iv. 167–8, 171–2, 298–9.

[4] *Letters and Papers*, x. 1063; Townshend, *Collections*, pp. 22, 286, 295, 298–9, 329–30. A realistic account of "the tumult and tempest" of a poll in 1623 is given in the *Stiffkey Papers* (Camden Soc.), p. 41, where a candidate "sounded his troupes againe . . . and caused all his forces to charge," and secured election by very literally "routing" his opponents.

[5] See the Maidstone and Norfolk election disputes, fully reported in D'Ewes, pp. 393–7.

[6] *Letters and Papers*, v. 171. An excellent example of a sixteenth-century "mandate" from a constituency to its members is given by Prof. W. J. Harte in *Trans. Devon. Assoc.*, xliv. 213: "A remembrance of certeyn articles for Mr. Thomas Williams and Mr. Geffray Tothill, burgesses for the Citie [of Exeter] at the parlayment in January, 1562." Williams was elected Speaker in that parliament, and was given £20 by the corporation for his services "in preferring the suits and business of the City" (*ibid.*, xlv. 409).

Elizabeth's reign were apparently the earliest occasion on which proceedings in the house of commons evoked any popular agitation. Cecil then heard cries in the street: "God prosper those that further the overthrow of these monopolies; God send the prerogative touch not our liberty"; and he remarked in the house that some "would be glad that all sovereignty were converted into popularity." It is ever the economic problem that drives democracy to think of politics, and even then the thought is mainly a matter of feeling; but it was with a novel sensation of horror that Cecil exclaimed in the house in 1601, "Why, parliament-matters are ordinarily talked of in the streets." [1]

Hitherto the commons in parliament had had to fight their constitutional battles without much support from outside, and the popular naval heroes of Elizabeth's time were, when they sat in parliament, always on the side of the royal prerogative.[2] But the corporate feeling which members developed during the long sessions of the Reformation and other sixteenth-century parliaments gave them a novel confidence. The medieval sessions of two or three weeks had given little opportunity to members, who for the most part never attended another parliament, to know one another and develop a common sense. But the seven years' parliament of 1529–36, with each of its sessions extending over months, produced a body of common experience, the effect of which was never lost; and the *Journals*, commencing in 1547, began to record its results and to provide a firm hold of precedents which gave solidity to the claims of the house. It assumed, step by step, control of itself and its members; and privileges, which had been referred in the fifteenth century to the lords and the judges to determine, were now asserted on its own authority.[3] The right of the Speaker and of the house to license the absence of members was recognized by

[1] Townshend, p. 251; D'Ewes, p. 653.
[2] *E. g.* Sir Humphrey Gilbert, Sir Richard Grenville, Drake, and Raleigh.
[3] In 1553 it was a committee of the house which decided that Alexander Nowell, having a seat in convocation, could not have one in the commons. For the growth of capacity and outlook in the commons cf. the debate on Goodwin's case in 1604, *Commons' Journals*, i. 159–60, 939–40.

statute in 1515.[1] In 1553 the house insisted on inspecting the charter to Maidstone, to see if it justified the novel appearance of burgesses from that town; pending its decision they were ordered to absent themselves, and Maidstone had to wait until 1563 to secure its representation.[2] In 1581 the house succeeded in establishing its control of the issue of writs for bye-elections;[3] and it began to compete with the crown's powers of creation by initiating bills to increase parliamentary representation.[4] Liberty of speech, which had been claimed for the Speaker when he appeared at the head of his colleagues in the parliament chamber, was now[5] claimed for the individual member in the house of commons. The commons, who had been a mere part of the high court of parliament, now claimed to be an independent court of record themselves,[6] with complete jurisdiction over their own members, their own proceedings, and their own organization. From being petitioners themselves, they assumed the position of arbiters of the petitions of others.

This is one of the obscure but important aspects of the development of the house of commons; and both its obscurity and its importance require some recapitulation in an effort to elucidate the growth of the legislative functions of the house. Difficulty arises not merely from the absence of *Commons' Journals* before 1547, but from the impossibility of tracing definite stages in the growth of customs, conventions, and institutions which were not made and did not proceed by definite steps. We have

[1] 7 Hen. VIII, c. 16.

[2] *Commons' Journals*, i. 25, 63; *Official Return of Members of Parliament*, i. 379–404.

[3] D'Ewes, pp. 281–3, 308.

[4] On January 18, 1563, a bill was introduced into the commons "for levying fines in the County Palatine of Durham, and to have two knights from thence into the parliament"; but it reached the statute-book shorn, at some unknown stage, of the latter provision.

[5] The first recorded claim is that made by Speaker Moyle in 1542 (*Lords' Journals*, i. 167; Elsynge, p. 176).

[6] "This is a court of record. . . . We have a clerk and a register. . . . It is now come to this question, whether the chancery or parliament ought to have authority" (*Commons' Journals*, i. 159–60). As early as 1549 the clerk of the house of commons referred to it as "this court" (*ib.* i. 14).

also to disabuse our minds of preconceptions due to an inevitable tendency to generalize from our evidence in order to simplify our conclusions. The evidence itself is often accessible only in a form which fosters false assimilation; and the uniformity of the printed "Rolls of Parliaments" obscures the diversity of their contents. Legislation may arise from many different sources and take many different forms. Nearly all of it in Edward I's reign is legislation by the crown either on its own motion or on petition from some other body or individual; but no one except the villeins is precluded from access to the freest place in England, and freemen may petition as individuals or as any kind of class or group. The crown has just as much authority to grant redress to one group without consulting the others as it has to do justice to one individual without the leave of his fellows; it is equally entitled to legislate without any petition at all. Edward I, however, developed the habit of doing these things in parliament, and the growth of the house of commons depended largely on its gradual establishment of a monopoly of access to the crown and of control over the crown's responses.

The house could not begin the process until it had acquired solidarity and a claim to be the commonalty of the realm. But this claim was secured during the fourteenth century, and the commons proceeded tentatively to assert an influence, firstly over all petitions presented in parliament, and then over the initiative of the crown. They managed to exclude the merchants as a separate estate from parliament, thus debarring their direct access to the crown in parliament. Next they successfully demurred to the crown legislating on a clerical petition in parliament without their concurrence; and in 1420 they petitioned against the validity of bills endorsed *per auctoritatem parliamenti* without their assent or request.[1] Thus we find clerical petitions in parliament reduced in 1429 to the vanishing point of a single petition that the clergy in convocation may enjoy the like privileges as the laity in parliament,[2] and the clergy

[1] *Rot. Parl.*, iv. 127. [2] *Ibid.*, iv. 347.

themselves to relying on the commons to back and present their petitions in parliament.[1] Individuals, however high and mighty, condescend to the same assistance—an archbishop of Canterbury, dukes, princes, queens, and even kings accept the common fate with royal compensations; and *ex mandato regis* [2] bills of resumption and attainder and provisions for the royal household and royal family assume the guise of petitions of the commons.

No doubt these dignities stooped to conquer, and their submission was somewhat feigned. It was pure assumption on the commons' part to assert a veto on royal legislation, and there was nothing in their writs or in the law to justify the claim. The petition of 1420 was refused, and *per auctoritatem parliamenti* long continued to appear on orders taken in parliament to which the commons had not agreed.[3] The clergy, too, continued to legislate in convocation, and in 1444 "a certain act was made in parliament by the king with the advice and assent of the lords spiritual and temporal" without any reference to the commons.[4] There was no monopoly for the commons yet, but on the other hand, they had their independence of other estates, and no consent save that of the king was needed to give effect to their petitions and their grants. The *Modus* declares that king and commons are sufficient for a parliament, and in 1480 the judges held that a grant by the commons was valid without the consent of the lords.[5] Nor, when we first get records of the various readings of bills and petitions by the lords, do we find that the *communes petitiones* are subject to that process

[1] *Rot. Parl.*, iv. 393.

[2] Cf. *Ibid.*, v. 8 *et passim*.

[3] The specific reference by parliament of business, with which it had not had time to deal, to the determination of the council (e. g. *Rot. Parl.*, iv. 334, 506) justified the application of the phrase to such measures taken when parliament was not sitting. A similar use or abuse of the authority of convocation in connection with the Forty-Two Articles has been much criticized without reference to precedents (cf. Gairdner, *Lollardy and the Reformation*, iii. 374–9).

[4] *Rot Parl.*, v. 68; cf. *ibid.*, vi. 49, for a similar instance.

[5] *Year Book*, ed. Maynard, 21 Edward IV, p. 48; Hallam, *Middle Ages*, iii. 108 *n*.

of examination; only the royal assent is expressed, and that is apparently enough.[1]

There are thus at least half a dozen different kinds of parliamentary legislation in the middle ages, and confusion results from treating them all as one and attempting to compress their history into a single line of development. There was legislation by the crown in parliament (i) on its own motion; (ii) on petition of the council; (iii) on petition of the clergy; (iv) on petition by the commons; and the fourth category itself falls into three divisions: (*a*) *communes petitiones*; (*b*) petitions of individuals adopted *ex parte* by the commons, and (*c*) financial grants. But side by side with the amalgamation of estates there went a simplification of legislative practice. The crown ceased in time to legislate in parliament on its own motion, preferring the forms of popular action; the petitions of the council became either government bills or bills introduced by the house of lords; and clerical petitions disappeared into convocation. There were left the commons' bills, of which the *communes petitiones* became public, and the *ex parte petitiones* private, acts, while the grants of money were given a special legislative form.

Singularly enough it is in connexion with the private *ex parte* petitions that we get the earliest evidence of the now familiar practice of three readings. The form of acts into which the *communes petitiones* were cast apparently discouraged their amendment in the parliament chamber, and there is nothing about three readings of them in the "Rolls"; in the absence of *Commons' Journals* we know nothing of the practice in that house, where the custom may well have been originated. We know little more of the rules adopted by the house in debating finance, though Hall's amusing story of the grants in 1523 shows that the "commons" and knights of the shire retained separate action with regard to their respective tenths and fifteenths, goods and lands.[2] These grants emerged from the house during

[1] These *communes petitiones* are kept separate from other petitions on the Rolls until Henry VII's reign.

[2] *Chronicle*, ed. 1809, p. 657.

the fifteenth century in the form of an indenture which was not always observed; and in 1426 the crown and the lords, after mature consideration of the judges in parliament, determined to ignore the conditions imposed by the commons on the grant of a subsidy in the previous parliament.[1]

As a rule, however, supply was accepted as it came from the house of commons, and details of procedure in the lords' house are first recorded in connexion with its more appropriate judicial business arising upon petitions presented by individuals with or without the endorsement of the commons. From the beginning of Henry V's reign, if not earlier, the clerk notes of such bills or petitions that they have been *lectæ, auditæ, et intellectæ coram domino nostro rege ac dominis spiritualibus et temporalibus in prædicto parliamento existentibus.*[2] In 1492 we first hear of their having been read more than once, *sæpe, sæpius*, or *persæpe*, and in 1495 we light upon readings *ter* and *trina vice.*[3] Three readings took some time to become the stereotyped procedure; in 1516 we have reference to a seventh and an eighth reading in the *Lords' Journals*, while the dwindling "Rolls" of Henry VIII's reign drop their mention of three readings and revert to the less specific record of a century before.[4] More important is the fact that these various readings spread to bills of all sorts, except such as were of grace and, being recommended by the crown, needed only one. The contagion of uniformity developed; and the commons, who in earlier days had been content with a single reading, a mere verbal acceptance, or even a tacit acquiescence, began to give three readings to bills which both the crown and the lords now condescended to submit for their approval. The process of assimilation reduced to a single rule of three readings in either house the various methods of medieval parliamentary legislation; but the crown retained its right of legislating out of parliament by

[1] *Rot. Parl.*, iv. 275–6, 301; cf. above, p. 288. [2] *Ibid.*, iv. 18 *et passim.*

[3] *Ibid.*, vi. 451–2, 460, 492–3, 512: *denuo recitatis et intellectis* occurs in 1485 (*ibid.*, vi. 275).

[4] *Lords' Journals*, i. 55–6.

proclamations and orders in council, and the church her right of legislating in convocation, without the crown's participation until 1532, and with it afterwards.

The control of the house of commons, however, over parliamentary petitions steadily increased, and in Henry VII's reign an act was repealed on the petition of the commons on the ground that it had been passed at the suit of a private person in the absence of the members for Lancashire, to which it referred.[1] The direct access accorded to chancery and the council had not debarred, though it had diverted, petitioners from the commons; and, while poorer litigants went as a rule to other courts, powerful suitors resorted more and more to parliament. The commons, by adopting private petitions and presenting them as their own *ex parte* the petitioner,[2] succeeded by steps which have not been traced in establishing the presumption that the crown could not legislate on private petitions in parliament without the commons' consent. The principle was recognized by Henry VII when he sought an act of parliament authorizing him to annul certain attainders in 1504, and this precedent was followed in the early years of Henry VIII; but it was not fully established until the Stuart claims to a dispensing power were repudiated at the Revolution. The authority of the commons over private petitions had been recognized, and perhaps enhanced by a practice, which begins early in the fifteenth century and develops rapidly during its course, of petitioners addressing their petitions to the commons instead of to parliament, the crown, council, or chancery;[3] for when petitions were addressed to the commons they clearly had the option of endorsing them or not.

The rapid development of the prestige of the house of

[1] *Rot. Parl.*, vi. 456–7.

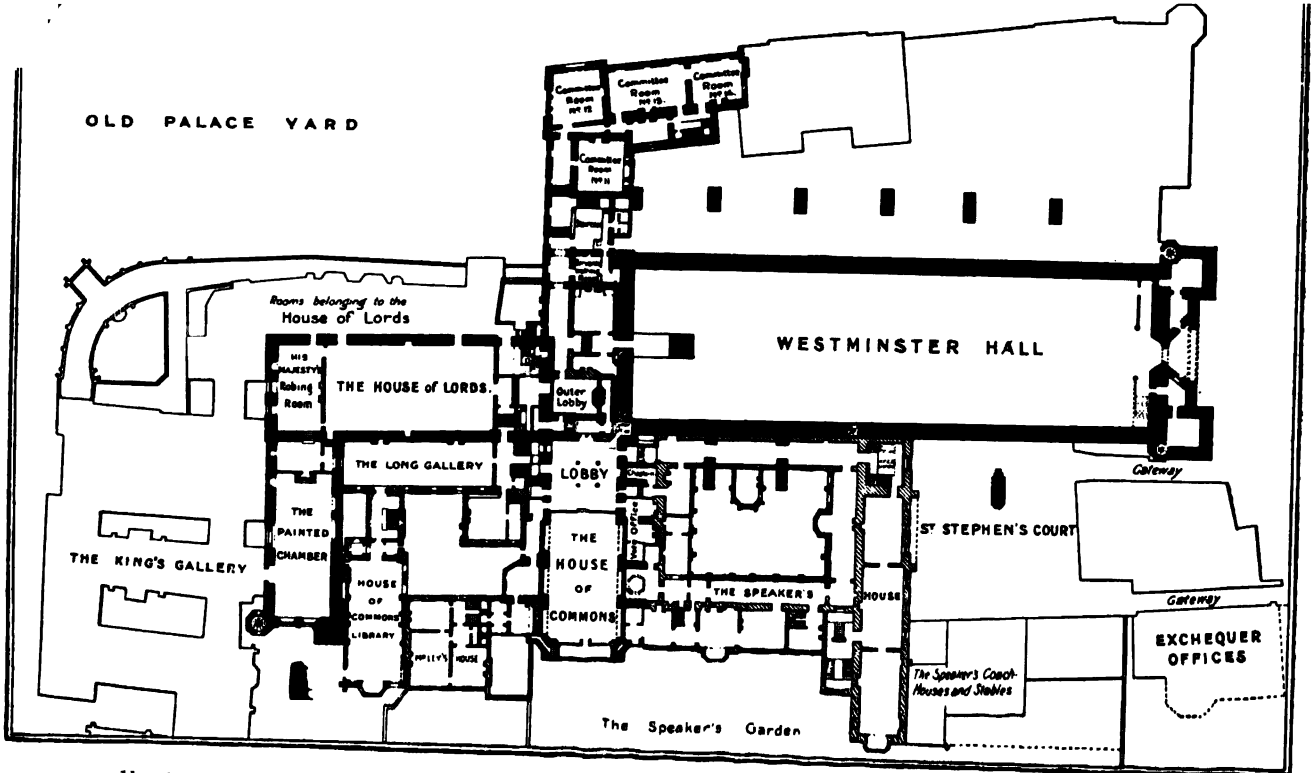
[2] There are innumerable instances of this practice in Henry VII's reign.

[3] Even peers addressed petitions to the commons; cf. the earl of Wiltshire's petition in 1472 "to the full wise and discreet commons of this present parliament" (*Rot. Parl.*, vi. 62). There is abundant evidence from the sixteenth century to justify Prof. McIlwain's doubts about the permanence of the commons' renunciation in Henry IV's reign of any share in judicial power (*High Court of Parliament*, p. 203). In the *Commons' Journals*, i. 45, there is a record of the hearing of evidence, presence of the accused, and confession of the criminal in a murder case.

commons during the sixteenth century led to the abandonment by the crown of the coercive measures it had not very successfully employed to secure attendance, though as late as Mary's reign members who had gone home without leave were prosecuted in the queen's bench.[1] Early in Henry VIII's reign the clerk of the lower house had been enjoined by statute to keep a register of the names and attendance of members of the house;[2] and from this register may have come the idea of instituting journals. But if it was kept, all trace of it has disappeared, and the *Journals* of the commons, unlike those of the house of lords, have never included lists of the names of those present. In Elizabeth's reign the house took control of its own attendance, and frequent resolutions were passed for calling of the roll by the clerk; but apparently no penalties were inflicted for absence, and it was left to the constituencies, and afterwards to the party organization, to control the attendance of members. But while the scanty presence of members in medieval parliaments and the measures adopted to ensure attendance indicate that the wages paid had become an inadequate consideration, the abeyance of those measures, and the full attendance after 1529, show that the political importance of the house had become a sufficient incentive. Assuredly during the Tudor period the average presence in the house was at least double what it had been in the fourteenth and fifteenth centuries.

Possibly this increase suggested its removal from the chapter house to St. Stephen's chapel, an important step in the consolidation of parliament. We are so accustomed to associate parliament with magnificent buildings at Westminster, and to think of houses built of brick or stone, that it requires a mental effort to realize that the house of commons, like the house of Lancaster or the house of York, was made of men, and might be anywhere. Parliament sat in various towns during the middle ages, and its paraphernalia was easily mobilized. A few woolsacks and

[1] Coke, *Institutes*, iv. 17; Strype, *Eccl. Mem.*, III. i. 262–4.
[2] 7 Henry VIII, c. 16.



V. Plan of the Houses of Parliament, Westminster Hall, and the Adjacent Public Buildings.
By Sir John Soane, 22nd March, 1833.

wooden benches, a cloth of estate and a chair for the king, and a wagon-load or so of papers, were all that was required; and even the exchequer was moved about from London to York and elsewhere. But as records grew in bulk and the machinery of government increased in complexity, the mobility of parliament diminished, and it tended to settle at Westminster and there to create a habitation of its own. The king, of course, summoned it to his hall and housed it in his palace, but in time parliament almost expelled the king from his court, and few people think, as they gaze at the houses of parliament, they are contemplating the palace of a king.

The commons, however, had only enjoyed the king's hospitality when they appeared on his business *in pleno parliamento*. Their private confabulations were their own concern, and they found a room outside the palace in the refectory and then in the chapter house of the abbey.[1] There they continued, apparently,[2] to meet till the reign of Edward VI, when they came across to St. Stephen's chapel, within the precincts of the palace. It is singular that this change should have passed almost unnoticed by contemporaries, and should have excited no comment from antiquaries like Stow and Camden. St. Stephen's had been a collegiate church, whose canons gave their name to Canon Row, sometimes called St. Stephen's Alley. It fell to the king by the second chantries act of 1547, and on 22 July, 1550, it was granted to Sir Ralph Vane, with the exception of the upper part above the vault of the chapel which had been assigned *pro domo parliamenti et pro parliamentis nostris ibidem tenendis*.[3] On his attainder it was on 29 April, 1552, given in fee simple to Sir John Gates, the vice-chamberlain, who in his turn was

[1] *Rot. Parl.*, ii. 237.

[2] There were exceptions; in 1523, for instance, parliament met at Blackfriars, whither it was also summoned on 3 November, 1529, but adjourned on the 4th to Westminster; and Mary thought of holding parliament at Oxford in 1554.

[3] *Patent Roll* 834 m. 22, 846 m. 28 (per Mr. R. H. Brodie and Miss Winifred Jay); *Literary Remains of Edward VI* (Roxburghe Club), p. 431. The usual story that Henry VIII made this grant is inconsistent with the references to St. Stephen's in the last volume of the *Letters and Papers*.

executed on 22 August, 1553, for his share in Northumberland's conspiracy. Stow remarks[1] that the chapel was thenceforward used as "a parliament house"; but even so, it does not appear to have afforded accommodation for committees, which generally met at the inns of court.[2]

Ostensibly the reunion of the two houses under one roof was a sign of concentration; but the commons came back on very different terms from those on which they had originally departed from the open parliament chamber to seek seclusion in the cloisters of the abbey for their domestic discussions, and the difference did not tend to the unity of parliament. They had gone forth in the middle ages merely as a group anxious for private debate, but carrying with them little of the glamour and authority of the high court of parliament which they left behind them in the seat of power. They came back as one of two houses, claiming an equal share in the dual control of parliament. Henceforth, whatever the commons said or did was said and done in parliament; one roof covered both commons and lords, and one constitutional halo surrounded their actions. The commons returned to parliament to

[1] Stow's *Survey*, ed. Kingsford, ii. 377–9. The reference (*Acts of Privy Council*, 1550–2, p. 172) to an account, dated 2 Dec., 1549, for "works about the parliament house" may concern the alterations to St. Stephen's chapel; for "the parliament house" was coming to be used instead of "the parliament chamber," and to include both houses of parliament (cf. *ibid.* 1547–50, p. 248, 1552–4, p. 20; *Exeter Records*, Hist. MSS. Comm. 1916, p. 51). Foxe, in his recension of his authorities, frequently changes parliament chamber into parliament house. "Domus" is often used of the parliament chamber in the *Lords' Journals* for Henry VIII's reign, and less frequently "domus superior" for it, and "domus inferior" for the commons (*Lords' Journals*, i. 5, 7, 15, 21, 45). In 1536 Cromwell writes of the "nether and upper houses" (Merriman, *Cromwell*, ii. 47). In 1515 (*Lords' Journals*, i. 46) it is suggested that indentures for knights of the shire be brought "into the parliament house" as usual; and in later days each house claimed that this meant its own. In the grant to Vane the house of lords is called "the lords' parliament house," and the house of commons the *domus parliamenti*.

[2] Apparently there was one "committee-chamber of the house" (D'Ewes, p. 253), but the following are some of the places in which committees met during Elizabeth's reign: the Star Chamber, Treasury Chamber, Exchequer Chamber, Inner Temple Hall, Temple Church, Parlour of the Middle Temple, New Hall in the Temple, Lincoln's Inn Hall, Serjeants' Inn, Savoy, Guildhall, Rolls Chapel, Marshalsea, and Court House at Southwark (D'Ewes, pp. 221, 249, 250, 253, 298–9, 300, 363).

dispute its control with the lords, and eventually to oust them from authority. Some, as Sir Robert Cecil remarked in 1601, would convert all sovereignty into popularity; and popularity made less allowance for the peers than it did for the crown.

Cecil's phrase is a significant omen for the constitutional history of the century, in the opening year of which it was uttered. It is also a useful reminder of the strides which the commons had made in the sixteenth century. But for that preparation under the Tudors there could have been no successful struggles under the Stuarts. No parliament in the middle ages had been able to wage a civil war or depose a king; its function had merely been to confirm the work of rival factions and provide titles for successful usurpers, to recognize the *fait accompli*, but not to accomplish it.[1] There had been baronial cliques, but never a parliamentary party, because parliament had possessed no *esprit de corps* and no self-consistency; it was a mere conference in which things were done by kings or by baronial factions. Under the Tudors it became an entity and an authority, active and independent, claiming to speak for a nation in tones to which kings must give ear. The petitions of grace had ended, and petitions of right assumed a political guise.

The commons had, they told James I in his first parliamentary session, yielded much to Elizabeth on account of her age and sex;[2] yet they had spoken in terms of insistence about her marriage, the succession, the execution of Norfolk and Mary Stuart which no medieval parliament would have adopted. It is an obvious criticism of the commons under Edward III and the Lancastrians that they objected to the measures of the crown, but had no policy themselves. They did not, indeed, think policy was their business, and they

[1] Little importance can be attached to parliamentary statutes entailing the crown upon successful claimants like Edward IV and Henry VII; for parliament had no option in the matter. Unless the king *de facto* was also king *de jure*, his writs were null and void, and the assembly summoned thereby was no parliament and could make no statutes. Henry IV had taken the precaution of compelling Richard II to issue the writs for the parliament which accepted his abdication.

[2] Gardiner, *Hist. of England*, i. 182.

invariably pleaded incapacity when asked for advice on matters of state. But their tone was different under Elizabeth; they had ideas of religious policy, of economic policy, and of foreign policy which they had not derived from authority and wanted to force on the crown. Even under Henry VIII the commons could be stubborn enough when they liked; attacks on the government were often made by individual members, and the house as a whole refused in 1534 to make spoken words treason, and rejected or amended various bills promoted by the government.[1] The parliament of 1545 has generally been taken as the highwater-mark of Henry's autocratic power; and eminent historians have depicted in sombre hues the servility of the commons.[2] A letter from Secretary Petre, written on the last day of the session,[3] puts its history in a truer and very different light: "the book [*i. e.* bill] of the colleges," he writes, "escaped narrowly, and was driven over to the last hour, and yet then passed only by division of the house. . . . The bill of books, albeit it was at the beginning earnestly set forward, is finally dashed in the common house, as are divers others." Moreover, several of those which passed both houses were so distasteful to the king that he vetoed them; and the picture of the king "having his own way in everything" is imaginary. Parliaments and people cannot change their character in a moment; and if Tudor parliaments had been servile, Stuart parliaments would not have achieved their independence.

The Stuarts, however, expected greater subservience from their parliaments than the Tudors had looked for; and their doctrinaire royalism hastened a struggle which could only have been avoided by submission on the part of king

[1] *Letters and Papers*, vii. 51; *Lords' Journals*, i. 71, 73, 80, 89; Pollard, *Henry VIII*, pp. 288–93.

[2] Cf. Stubbs, *Lectures on Medieval and Modern History*, 1887, pp. 288–9: "Clearly the independent spirit has nearly evaporated. The ecclesiastical bills pass without a protest. . . . The *Journals* [there are none for the commons] record no opposition or protest; the king has his own way in everything"; and the *Political History*, v. 470, speaks of the king "securing by his repeated presence at the debates a tranquil passage for both measures" (the subsidy act and the chantries or colleges act).

[3] *Letters and Papers*, XX. ii. 1030–1.

›r parliament. The commons had developed a will of their ›wn, and the only question was how far that will should ›ncroach. They were firm in their protestantism and in ›heir determination to control supplies; their protestantism ›rovoked an ambition to dictate a protestant domestic and oreign policy, and their determination to control supplies ed them to attack the instruments by which the crown ought to enforce non-parliamentary taxation. They were hus brought into collision with the whole administration of he crown, and civil war could alone decide whether king ›r parliament should dispose of the national forces. The ommons appeared to triumph over the lords as well as ›ver the crown in 1649; but the permanent lesson of the truggle was that civil war leads to military dictation, and he common subjection of crown and parliament to the .rmy produced a national resolution to avoid the cure of nilitarism for the future. James II's attempt to support ›is government by military force deprived him of any party villing to fight; and without force at its command the crown vas at the mercy of parliament.

The Revolution of 1688 did not, however, establish respon- ible government in England in the sense we attach to the ›hrase. For in that sense responsible government involves wo things: firstly, the responsibility of the executive to he legislature, and secondly, the responsibility of the legis- ›ature to the people. The second is the more important of he two, for the American constitution has shown that it is ›ossible to secure popular self-government without making he executive responsible to the legislature. But no popular elf-government is possible unless the legislature is responsible o the community; and it was in this respect that the Revolution was defective. The mere existence of the house ›f lords, and its claim to co-ordinate powers with the elected ›ouse of commons, hampered the operation of this respon- ibility. But more important than the irresponsibility of he house of lords in the eighteenth century was the irre- ponsibility of the house of commons. The commons had n the seventeenth century claimed as autocratic a power

as the Stuarts. They asserted for their resolutions the force of law;[1] and by their own authority they had in 1649 abolished two out of the three branches of the legislature. They prolonged their own existence, and excluded their opponents, not merely from the house of commons, but from the rank of electors. It was their "horrid" arbitrariness, as Cromwell called it, which opened the way for the more horrid arbitrariness of military despotism.

The exclusive spirit was still strong in both houses of parliament during the eighteenth century. The reporting of debates and the publication of division lists were denounced as giving colour to the idea that members were responsible to some authority outside the walls of parliament. Expressions of opinion unfavourable to the house of commons, such as the Kentish petition, were voted scandalous, and the house attempted to punish the petitioners as though they had committed a crime. It claimed by resolution to disfranchise electors; it decided disputed elections by party votes in the house; and even went so far as to unseat members who had been duly elected and co-opt candidates who had been duly defeated.[2] Its criterion was its own privilege, and it had little respect for any one else's liberty.

The Revolution had transferred power from the crown to parliament, but not from parliament to the people. The merest fraction possessed votes,[3] and the voters themselves

[1] Prothero, *Select Documents*, 1898, p. 290; Gardiner, *Documents*, 1889, pp. 26–7. In the former, the "Apology" of 1604, the commons assert that the power of parliament is "above the law," and in the latter document Charles I complains that some of them "have not doubted to maintain that the resolutions of that house must bind the judges," and that "their drift was to . . . erect an universal overswaying power to themselves."

[2] On April 13, 1769, the house declared Colonel Luttrell, who had been twice defeated by John Wilkes, to have been duly elected, and falsified the return accordingly.

[3] An important but less familiar struggle was waged in some constituencies over the franchise. Thus, at Reading, on October 22, 1705, the corporation resolved that "for the time to come the mayor, aldermen, and burgesses in their common counsell, in case of members to serve in parliament for this borough, doe first determine and resolve amongst themselves whoe shall be deemed fitt representatives for that purpose"; but on March 4, 1761, it issued a declaration that it never intended to deprive the inhabitants paying scot and lot of their votes at parliamentary elections (*Hist. MSS. Comm.*, 11th Rep., vii. 204, 206).

little power. Elections simply meant a choice of masters, and not a decision of policy. Only twice in the eighteenth century was a general election held to settle a public question, once in 1701 when William III appealed to the country against a Tory house of commons, and secondly in 1784, when the younger Pitt appealed to it against Whig domination. For the rest ministers were changed, policies adopted and discarded, war declared and peace made, without the least reference to the electors. Each election was a local and personal contest, and not a political conflict of principles. A member did what he liked in parliament, subject to the whim of the owner of the borough for which he sat, and the same territorial magnates decided the contests in the shires. The commons in parliament enjoyed the fruits of a victory they had won as representatives of the people, but they did not wish to share them.

George III interrupted this comfortable state of affairs, and turned against parliamentary magnates their own political arts. Their lack of public support facilitated George's operations. He could never have bribed and cajoled a really representative house of commons, but an almost self-constituted body of landlords and their clients could be met with the weapons they used, and it was the success of the "king's friends" which opened the eyes of the Whigs to the need for reform. Unless corruption were checked, George might recover by influence what the Stuarts had failed to retain by force. On the other hand, if corruption were checked and parliament reformed, there would be an end to the Whig system of government. Distracted between fear of corruption by the crown and of reform by popular pressure, the old Whigs and Tories were saved for a time by the French Revolution, which made reform a nightmare; and for another generation the breach between the commons in, and the commons out of, parliament grew wider. Political reform might be stayed by the French Revolution, but industrial changes were not, and the old representative system became inconsistent with every principle of representation.

The reform act of 1832 was, however, essentially a bourgeois achievement; it enfranchised the middle classes, but not the poor, a number of whom actually lost the votes they possessed before. Not until 1867 were the town artisans, nor until 1885 were the agricultural labourers really represented by the commons in parliament. Meanwhile religious and other disabilities were removed, and it became possible for all sorts and conditions of men, Roman Catholics, Nonconformists, Quakers, Jews, Mohammedans, Free-thinkers, to sit and vote in parliament. Within two generations of the reform act the house of commons was converted from a political club, with its membership limited practically to one class, into a microcosm of the nation. It comprehended, not merely one or two estates of the realm, but all; and it monopolized all their powers. It extended its sway, because it abandoned its privilege, and accepted the position of agent to the community. It ceased to claim independence, and so it won legal omnipotence. Once or twice in the later middle ages a clerk with a prophetic soul described the commons' house as the *communitas communitatum;* the communities have become a community, the estates have become the state; and when we speak of the state we mean the state in parliament.

CHAPTER XVII

THE STATE IN PARLIAMENT

THE State is a word which does not appear in the English language until the close of the middle ages, because the idea it seeks to express had not before dawned on the English mind. It cannot be translated into ancient Greek, because the Greeks could not divorce the idea of the state from the particular form in which it was made manifest to them; and so they had but one word, πόλις, for both city and state. The Latin *respublica* and *civitas* come nearer to our meaning, because the wider experience of the Romans made them familiar with a greater variety of states; but the Romans hesitated to apply either *civitas* or *respublica* to Persia or even to their own *imperium*, while both Persia and the Roman empire are, to our minds, as much states as the cities of Athens or of Rome. It is the modern diversity of political organization that makes both necessary and possible some generic word to express the idea without denoting any particular manifestation. Nevertheless, every member of a state does habitually associate with it in his mind some peculiar characteristic. The German used to conceive of might as the essence of the state, with a soldier as its embodiment and a Hohenzollern at its head. To a Russian the state was largely the tsar, to a Frenchman *l'administration*, and to an American himself.[1] To an Englishman its embodiment is parliament.

This English conception rests on a sound historical basis.

[1] A British judge once addressed an American in court as "one of the subjects of the United States," to which the American objected that he was one of the sovereigns of the United States. But the point of view is changing, and some Americans would say that the States are the state.

The state is a fusion of estates, and the fusion was brought to pass in parliament. The indefinite number of estates which gathered at Westminster in the fourteenth century gradually merged into three, which in the sixteenth century were authoritatively defined as crown, lords, and commons;[1] and the three estates of the realm were melted into the national state by the fervour of sixteenth-century nationalism. Under Henry VIII its complexion was royal, in the eighteenth century aristocratic, and to-day it is popular. But the unity wrought in parliament has never been seriously disturbed since the Civil War and the Revolution; and within England itself, whatever we may say of Scotland, Ireland, or realms beyond the sea, there has been no greater danger of two states than its division, of which Disraeli spoke, into a nation of the rich and a nation of the poor.

Out of this fusion grew the supremacy of parliament. When in the twelfth and thirteenth century the foundations of an English constitution began to emerge, only an estate could tax itself. Thanks to Edward I it could only tax itself in parliament, and the conference in which the taxing was done gradually became the authority for the act. By a somewhat subtle and protracted process, estates which had taxed themselves in parliament assumed, under the garb of parliament, the power to tax, and to bind in various ways, other estates as well; and both the Anglican clergy and the nobility have lost their medieval right to tax themselves, and are taxed by the house of commons, from which they are both by law excluded. The merging of the individual in his "estate" involved the surrender to that estate of his individual liberty; the merging of the "estates" in the state involved the surrender to the state of their medieval autonomy. In England it was a slow and gradual process of parliamentary evolution: and as late as the reign of James I parliament itself

[1] Burghley, at a joint committee of lords and commons in February 1585 (D'Ewes, p. 350). Cowell, however, in 1607, gives the modern version (Prothero, p. 410).

speaks of "the state ecclesiastical" as well as of "the whole state of the realm," while the king talks of "the state of monarchy."[1] In France the fusion took the form of sudden combustion known as the French Revolution, the critical stage in which was the agreement of the three estates to sit and vote together as a national assembly, submitting to a majority. The state in parliament has thus become an embodiment of Hobbes's *Leviathan*, and Austin expressed its essence in juridical language when he defined law as the command of the state.

The sovereignty of parliament is, however, only a legal sovereignty; behind it lies the political sovereignty of the electorate and the general will of the people, which parliament is supposed to reflect with more or less fidelity. But the "people" is so indeterminate an expression that its use, let alone its abuse, obscures almost all political discussion. Who are "the people," and to what extent do they really govern? Abraham Lincoln's famous rhetoric at Gettysburg to the effect "that government of the people by the people for the people shall not perish from the earth," has achieved a world-wide vogue, because it expresses a common aspiration without attempting to define it. His words did not state the problem with which he had to deal, nor suggest a solution. Every southerner against whom he fought could subscribe to his principle, and its enunciation no more defined the issue than it provided a basis of reconciliation. The south believed that under this specious phrase Lincoln was asserting a claim to the government of the people of the south by the people of the north for purposes of which the north alone approved; and the remark, which an American writer directs against the British empire, that "a democracy pretending to sovereignty over other democracies is either a phantom or the most intolerable of oppressions," is not without relevance to the conquest of the southern by the northern States. So far as the south was concerned, Lincoln's recipe was that of Oliver Cromwell—"what's for their

[1] Prothero, *Documents*, ed. 1898, pp. 288, 291, 293.

good, not what pleases them—that's the question"; and at Gettysburg he was a unionist rather than a democratic statesman.

His real meaning was that government of the people as a whole, by the people as a whole, for the people as a whole should not perish from the earth; and his essential principle was the right of majorities to coerce minorities. Probably Edward I meant much the same thing with his maxim *quod omnes tangit ab omnibus approbetur*; and the purport of the principle in application was to exclude such claims of those of Peter des Roches, who asserted immunity from taxation to which he had not consented. The issue of north against south was to determine what was the whole, and what was a part. The south stood to the north in 1861 in a stronger numerical relation than the thirteen colonies did to the mother country in 1776; by what right could those who claimed for the part its independence of the whole in 1776 deny the right of a larger part to assert its independence of the whole in 1861? And if the part is bound to and by the whole, by what right did sections of the catholic church separate from the whole and reform themselves in the sixteenth century? The right to secede has been the political and religious making of the American people, and an indispensable weapon of human progress. We can get no nearer to a principle on Abraham Lincoln's lines than to say that a group of men may, if it can, make and call itself a nation, and may then deny to other groups the rights they themselves claimed to exercise. Ireland illustrates better than any hypothetical case the crucial ambiguities which Abraham Lincoln's wisdom concealed. Government of the people by the people for the people is not in dispute, and all the parties take their stand upon unity, unionists on the unity of the United Kingdom, nationalists on the unity of Ireland, and Ulstermen on the indivisibility of Ulster. The fact that men hold a common principle does not prevent them from waging war to define its application. One faith in parliamentary government will not save us from diversity of

parliaments; and so fully has the state been merged in parliament that diversity of parliaments has sometimes meant disruption of an empire.

Nor is the problem a mere numerical difficulty, for the claim that the whole is greater than the part is nothing but a mathematical dogma without significance for human or practical affairs. To the thirteen colonies in 1776, as to the southern states in 1861, the part was greater than the whole; and to many an individual his single soul is more than all the world. It is the essence of all religion that man's relation to God and conscience makes his relation to the state conditional and not absolute; and the absolutism of the state is a form of pagan idolatry. It is only within limits and upon conditions that the whole can dictate to the part, even to so small a part as the individual citizen. To determine those limits and to define those conditions is the function of human progress in politics. To ignore them or to deny their existence, and upon that denial to build a parliament or a state, is to build it upon the sands. Man is a great deal more than a political animal; and the best parts of the best men are those with which parliament has nothing to do. Politics are a second-best business of second-best men, and we do not rank our politicians with our poets and philosophers. Whatever a man may render to Cæsar, he may not surrender his soul. Government of the people by the people only implies control of an indeterminate part of human affairs by indeterminate parts of the human race.

Nor, indeed, is government by the people anything more than a rhetorical phrase; and it is somewhat ironical that the most progressive of Lincoln's admirers have found in government by commission the highest interpretation of government by the people in municipal affairs, and in national affairs a popular dictatorship. Government by the people is government by those whom the people send to Westminster or Whitehall, in either a direct, or a roundabout way, for reasons that may have nothing to do with administration. Questions of war and peace, of foreign

policy, of public health, of education are not determined by popular election; and the nearer a public body approaches to direct popular sovereignty, the more circumscribed its powers will be. A parish council is the authority which embodies most fully Rousseau's ideal, and its powers are narrowly limited by act of parliament and carefully controlled by a non-elective local government board. Extended powers are only entrusted to bodies elevated high above the average elector. Even in casting a vote for those to whom his rulers will be responsible, the voter does not consciously express an opinion on more than one or two issues; and the opinion has to take the form of a blunt yes or no, when the solution will probably be a compromise for which no one would have spontaneously voted at all.

Government is, in fact, a technical matter with which only experts are fitted to deal. In the rudest of primitive societies every individual did a more or less equal amount of everything, including what government there was; and some small communities, like ancient Athens, clung to the idea that office should go by rotation and be determined by lot. But long before national states were evolved, functions were highly specialized. Individuals gave up attempting to do everything equally in order that they might do some things better. Instead of all fighting pell-mell by the light of nature, some were made soldiers with nothing to do except to make themselves expert. Instead of all keeping watch and ward in turn and pursuing the hue and cry, a standing police force was created to keep the community's peace. Instead of all meeting in popular councils, some were chosen to manage the politics of the people. From being jacks-of-all-trades men have sought to be masters of one; for the rest they rely upon representation, and the community only performs its functions by vicarious skill. Democracy, if it involves a reversion to the original type of society, in which every man took an equal share in politics, is a hopeless form of reaction.

But it is only the crudest of doctrinaires who think that people can govern themselves in the sense of administering

their own complicated affairs. No employer can do all the work of the men he employs; and the best that the public can do is to judge of the work that is done in its service without attempting to do the work of its servants. It is not a bad judge of the effects of legislation and government, because it is the public which feels them; and, as Washington said, people must feel before they can see. They are not, however, good judges of legislative proposals, because to foresee effects requires a natural imagination combined with expert political intelligence. For this reason both initiative and referendum are doubtful expedients. Aristotle's remark that the best judge of a dinner is not the cook, but the diner, is valid in politics; but the diner is not, therefore, a competent cook. The public is a bad legislator, but a competent judge of legislation. A wise public will, therefore, not attempt to legislate itself, but will insist on the responsibility of its legislators, and dismiss them if they fail. Parliament is the skilled legislative agent of the electorate, and there is no reason for its existence unless it is more expert in politics than its employers.

The case for democracy does not, indeed, rest on the wisdom of the electorate; and no one can have any doubt that every extension of the franchise has lowered the average intelligence of the voter. It is not, however, the brains of the voter, but his interests that justify his claim to a vote. Every class governs in its own interests when it has the chance and is irresponsible; and the only tolerable foundation for the state in parliament is one on which all estates can stand. It was Hobbes's plea for monarchy that the monarch was superior to all class interests; and it is conceivable that an all-powerful bureaucracy might adjust the interests of the various classes with less friction and a finer discrimination than is possible as a result of the rough-and-tumble of British politics. The chief argument for parliamentary government is that results are obtained by discussion between the divergent interests, and are imposed by consent—a method which produces a better

average of humanity than the most scientific of despotisms. But it is for parliament to frame those compromises, which we call laws, between clashing interests. Not even the most rabid democracy has proposed to graduate an income-tax by popular referendum; and an actual incident in municipal politics illustrates its humours and its dangers. Six improvements were once submitted to the burgesses of a particular town for approval; all were carried by large majorities. A seventh proposal was to raise a twopenny rate to pay the expense; it was rejected by a majority about as large as that which voted the improvements. It is obvious that the government which carries reforms should be responsible for raising the revenue; there is no sounder rule in the house of commons than that which prevents any one who is not a responsible minister from proposing additional expenditure, and there is nothing more vicious in the United States congress than the practices which arise from neglect of this precaution. There would be little endowment of higher education in England if it depended on the votes of those who do not aspire to profit by it, and little promotion of scientific or other research if it were referred to the masses who cannot judge of its value.

The validity of popular judgement is limited to problems which the public feels, and the bearings of which it can grasp. Practically it is only upon such questions that the mass of voters have any desire to cast a vote. A proposal to close public-houses will in England excite more popular interest than any question of foreign policy; and the technical arguments about free trade and tariff reform have to be reduced in the forum to the vulgar shape of the little loaf, two jobs for one, or taxing the foreigner for England's benefit. The reason for submitting such questions to popular judgement is that the people feel the pinch, and to feel the pinch without the means of relieving the pressure creates a sense of social injustice and friction, which, in its turn, hampers the efficiency and impairs the peace and energy of the community to a greater extent

than the lack of trained intelligence Whether wage-earners should be paid in kind, and what is a dangerous trade or a living wage, are questions better left to the political sense of the community than to the highest skill of supreme courts of justice. A court of law is not the place to determine questions of politics, and the fact that the high court of parliament has become more political and less judicial, while retaining the sole control of legislation, is one of the reasons why in England we have no election of judges and no proposals for their "recall" by popular vote.

There is, however, nothing final in politics. The best constitution is that which adapts itself best to the actual state of society. The increase of popular education automatically widens the legitimate sphere of popular judgement; and when the mass of the voters comprehend the conditions of foreign policy there is no reason why they should not claim its control. It is a matter which rests with themselves, and the control will only come when electors feel keenly enough about foreign policy to subordinate to it the petty considerations of personality, local interest, and party feeling, by which most votes are determined at present. But under no conceivable circumstances will the mass of electors become so expert in the increasingly complex problems of politics as to render superfluous the advice and guidance of specially trained intelligence. Government by the people can, under existing circumstances, mean no more than government by agencies which are responsible to the people and regard their authority as a trust to be exercised for the people as a whole, and not in the interest of themselves or of the class to which they belong.

Man is, however, a complex creature, with many needs and feelings for which he requires expression; and it does not follow that any single agency is the best medium for all the requisite forms of expression. For half a century or more there has been a tendency to make the state in parliament the universal and omnicompetent exponent of all that men think or feel. Yet there are all-important

exceptions. The German might make the state his religion and the kaiser his great high-priest; but the Englishman has, for the most part, rejected parliament as the proper exponent of his religion, and free church principles appeal to a wider circle than that of the free churches. A sympathetic echo is repeated from opposite quarters, and the syndicalist is one who wants to apply free church principles to his bread-and-butter. He thinks that each group of workers should determine the wage and the hours for which it should work, and the price at which it should sell the product of its labour. A preliminary condition would be the elimination of the capitalist, and the control by the group of the capital as well as of the labour it required; but a more serious difficulty consists in the extent of the bargaining involved with other groups. Before one group could produce anything at all, agreements would be necessary with countless other groups engaged in making the instruments needed by the first, and the regulation of these relations by endless independent sovereignties, instead of by parliament, would seem to involve an amount of friction not far removed from anarchy.

Indeed, the movement has the appearance of a reversion to the medieval system of liberties from which England was redeemed by the growth of parliament. It is a reaction to vocational, and not to local particularism, but it is none the less an effect of restricted consciousness and retarded political education; and it is based on a determination to exalt the group at the expense of the community. It arises from impatience with the slowness of communal action compared with the rapidity of the results secured by strikes and other forms of action by which the group, in moments of parliamentary weakness, can blackmail the community. It is also an imitation of the unprincipled methods by which superior groups of landlords and merchants have "cornered" commodities and taken advantage of national needs to fleece the nation for individual gain. Miners are as much entitled as mine-owners to extort what profit they can from monopoly, and the producer who demands higher wages is on the same

moral plane as the trader who raises his prices. The monopoly is the source of the evil; like every other liberty it cannot remain uncontrolled by parliament. It was once said by a statesman of moderate views that the state must control the trade in drink or the trade in drink would control the state. There is a corresponding antithesis between the state and every other form of interest; and the problem again is one which Abraham Lincoln's democratic maxim gives us no help in solving. Both syndicalism and socialism are government by the people; the question is, whether that government is to be by the people in guilds or by the people in parliament.

The fundamental difference between syndicalism and socialism is that one is, and the other is not, fatal to parliament. Syndicalism is disruptive, anarchic, and illogical. It aims at providing a sort of government, not merely by isolating one group from another, but by isolating one aspect of life—the economic—from all the rest, and making the cash-nexus the bond of human society. In the middle ages the guild or group concerned itself with almost all aspects of human activity, not merely with the livelihood of its members, but with their education, their religion, and their amusements. Each guild was a little state and church within itself, with its patron saint, its ritual, its technical education, its rules, which regulated the minutest affairs of each member from the cradle to the grave. The system had its advantages, but it was incompatible both with individual liberty and with national organization; it was a less expanded form of selfishness than patriotism. Presumably its modern imitators do not propose to make education, religion, domestic and foreign policy subject to group control, and therefore dependent on group support. But a group which depends on the community as a whole to supply most of its needs can hardly expect independence in the sphere of its choice. Even economic independence is a chimera; it is impossible to segregate groups of men in a community, and still more so to isolate the different instincts of mankind, and base on one of them a social or political system.

The isolation of the "economic" man is as fatal to syndicalists and to Mr. Norman Angell as it was to the classical economists. There are things for which men will fight, however little war may pay, and there are objects for which they will vote in defiance of all their economic interests.

These *imponderabilia* are the stuff of which politics are made, and sentiment is the most stubborn of facts with which the statesman has to deal. It may be that, while the economic interpretation of history supplies the key to the past, the key to the future is in the idealist's hands. Man is not precluded from aspiration because he sprang from something like primeval slime, and the state is not limited to material interests because it grew out of material necessities. We are not obliged to fix our vision on the depths from which we have risen, and the future may lie in aversion from the past. The growth of the state in parliament has been in vain if it is still to be bound to the conditions from which it has won emancipation. The essence of its success has been its constant adaptation to circumstances, and a fresh orientation of the state in response to moral development is not less feasible to-day than it was yesterday and the day before. It is a childish mind which only sees in history its superficial repetitions.

The state has, it is true, been made by the selfishness of men; and it consists of the burdens and obligations which they have transferred from their shoulders. Nowadays we are impressed by the magnitude of the responsibilities the masses have thrust upon the state since they gained control of parliament—free education, free food for school children, free treatment in hospitals, public parks and museums, and a host of other amenities open to those who do not pay, as well as to those who do. But the process is not new, nor are the masses those who began or have profited most by the transference. When William the Conqueror disposed of the land, he merely leased it on terms of service at his court and in his army; and the whole burden of national defence lay on the holders of land. By degrees these holders were enabled in parliament to fix and limit

this obligation, then to reduce it, and finally to escape it altogether. Each step in their emancipation involved an increased burden on the state, until the whole was transferred from the land to the people. What landlords did in the middle ages merchants achieved by their parliamentary influence in modern times. When new worlds were discovered and the seas made highways of traffic, the merchant adventured at his own risk and expense. It was his enterprise and his concern, and no one else assumed any liabilities if his vessel were robbed by pirates or wrecked on uncharted shores. But gradually the merchants, as they acquired political power, transferred this burden to the state, and it became a matter of national obligation and expense to survey the oceans, build lighthouses, deal with pirates, and render the high seas as safe from human violence as the king's highways on land. Merchant ships need no longer go armed in time of peace, nor sail in convoys; and taxes voted in parliament diminished the risks and increased the traders' profits. It was these two processes which created the English army and navy, and provided the state with its fighting forces.

Other activities of the state have developed in similar ways by parliamentary agency. Instead of a system of blood-feuds by which each family redressed its own wrongs, or of trial by battle, we have a national system of justice. Instead of each man being sworn to arms for the preservation of the peace, we have a national police force. English trade-interests abroad, which were once supervised by the agents of individual guilds and companies, are now in the hands of a national consular service; and the foreign office controls diplomatic relations which were, in the middle ages, largely relations between one corporation and another, and not between national states. One of the difficulties in the early days of diplomacy was the little control which each state exercised over its subjects, and fifteenth- and sixteenth-century treaties have elaborately to lay it down that they are binding on subjects of every degree. Colonies and planta-

tions, which were originally founded at the expense of chartered companies, and ruled by them, have been taken over by the state, and the colonial office is the result. In fact, every department of government represents some obligation or burden which has been transferred by parliament from individuals to the state. The state consists of burdens of which individuals have been relieved; and every subject considers he has a right to innumerable national services. Socialism is not a sudden growth of latter days; it is the product of the parliamentary development of the state.

The English state has thus been created out of the material needs of individuals working by means of parliament; it does not follow that it exists merely for their satisfaction. There is clearly a limit to the process by which every individual seeks to get all he can out of the state; and the costliness of modern socialism is due to the extension of the numbers entitled to vote for parliament. Occasionally general elections have resembled public auctions, at which votes are knocked down to those who promise the greatest amount of parliamentary assistance; and signs have been discovered of ultimate national bankruptcy, unless the rush to draw more and more out of the state can be met by a move to pay more and more in. That is the basis of national service. The state has consisted of the burdens thrust upon it; it should consist of the sacrifices men offer. The historical process must be inverted, and the rights of man subordinated to his duties and responsibilities. The test of future citizenship will be what a man gives, not what he receives; and there is good authority for the belief that to give is the better condition. The function of parliament has been to distribute the burdens imposed on the state by the shirking of individuals; it should be to distribute the benefits accumulated through personal service. The debt should become an endowment, the duty a satisfaction.

There is, however, no virtue in compulsion, and sacrifice ceases to have any value when it ceases to be free. It becomes an imposture by imposition. The strength of a

state consists in the extent of the sacrifice its people offer; its weakness in the extent of the sacrifice it extorts. The state, moreover, consists of the sacrifice made; it is not a deity to which the sacrifice is offered. That is idolatry. The state, like parliament, is made of men and women; without them it is nothing. It is not, therefore, an external and mysterious entity. It consists of one's neighbours and oneself, and most of our differences depend upon the emphasis we put upon the egotistic or the altruistic aspect of the state. It is an expression of the mind, or of part of the mind of its members; no quality in which they are deficient can characterize their state, and their predominant attributes will decide its nature. When Treitschke said the state is might, he was merely expressing in other words the German's belief in the duel; and when he repudiated the idea that any international tribunal could bind the national state, he was simply applying to the state that exemption from the rule of law which the duel secures for the individual. Germany's methods of making war merely magnified the characteristics of German personal relations. The state is merely man raised through parliament to the power of the state.

It is doubtful whether the word has not outlived its usefulness. It means too many different things to different people to have much meaning left at all; and in the British Empire, at any rate, we should express our meaning more precisely by speaking of the community than of the state, for confusion is inherent in the use of the same term for the community and for its government. The German had no difficulty in imagining a state whose will and interests were independent of the community, because he felt that he needed a master. British peoples, on the other hand, believe in governing themselves, and to them the state means nothing apart from the community; it is simply the organization of the community on a parliamentary basis. But it is idle to speak of the claims which the community has on the community; and, if the sovereignty of parliament is identical with the absolutism of the state,

it is a meaningless term to a self-governing people, unless it means unlimited duty to one's neighbour. There are clearly limits to that duty, and therefore to the claims of the community.

These, indeed, are recognized in practice. Parliament does not impose a common religious service or political opinion; and, though it does impose a common obligation, there are lengths to which that common obligation does not go. The problem is to define the limits of common obligation in terms compatible with individual liberty. It is something to have made the obligation common; it was differential in the days of privilege. Being common, it tends towards equality; for if the basis of the state be obligation, the obligation must be equal. If, on the other hand, the basis of the state is oblation rather than obligation, there is ample scope for aristocracy. No one can ever be compelled to give his best, or will ever give it on compulsion. Compulsion only yields a common mean; and the community is ill-occupied when its activities are devoted to reducing effort to a common level. The trades-union descends to such methods only because its members work for a master; and if the state is regarded as a similar master its service will sink to a similar level. There is no limitation of output when each is a volunteer in a cause that is his own.

The value of the state in parliament is that thus it becomes common property administered by consent. Its obligations, like its taxes, come by way of grant and not of imposition. The grant is a matter of compromise, average, and negotiation; and our efforts to avoid compulsion involve a vast expenditure of energy. We maintain our army by advertisement, and upon appeals to voluntary aid our army relies for its nurses. Upon similar appeals depend our hospitals, our system of higher education, our societies for the prevention of cruelty, and hundreds of other organizations performing functions which might be performed with greater dignity, efficiency, and economy by the state. To achieve the economy, efficiency, and saving

of dignity secured by the performance of these functions by the state would, however, involve a conscription of capital; and whatever may happen to lives or labour there must, it seems, be no conscription of wealth. That the claim to men's lives should be thought reasonable and the claim to their capital unjust is perhaps the most striking illustration of the extent to which in a capitalistic state capital takes precedence of human life, and to which, even under a democratic franchise in a parliamentary state, wealth can make its influence prevail over numbers.

But it is only in a parliamentary state that these rival claims of classes and of interests can be adjusted. Syndicalism is no remedy, and direct action in the form of the initiative and referendum is little better. The essential vice of syndicalism is that it is a form of dissociation rather than association, and minimizes, if it does not destroy, the responsibility of each group to others. Power must always be a matter of responsibility, whether it is exercised by an individual, a parliament, or a trades-union. It is a trust, and the idea that its possessor is responsible to and for no one but himself is as pernicious for the voter as for the monarch. No one is really entitled to a vote except in so far as he feels in using that vote that he is exercising a trust for other people. Representation is a means of developing responsibility, and the wider the interests and the group for which the representative is and feels responsible, the broader and the deeper will be his sense of responsibility. Indirectly, too, he educates his constituents in a similar sense. The presence of trades-union leaders in parliament forces upon them a sense of national obligation in addition to their group-responsibility, and in turn the trades-unions which have representatives in parliament will think more nationally than those which have none. The particularism of the American colonies before the war of independence was so pronounced that the mother country had, on occasion, to pay them to defend themselves, and they were quite incapable of concerting a common colonial policy. The

reason was that they had no representation in the parliament responsible for their defence, and no common parliament of their own. The problem exists to-day in a modified form, and it underlies the national and imperial politics of the British realms; the narrower the responsibility, the duller the political capacity. It is only by contact with wider issues that the political sense of groups and individuals is quickened, and the greater the emphasis on the particular the feebler the perception of the general. *La petite politique, c'est l'ennemi de la grande.*

Hence the need of an imperial parliament to broaden the outlook of its members, and by their means to communicate that wider sense to their constituents. A member of parliament serves the nation, and not merely his constituency. His constituents do not merely elect a local representative, but cast a vote on national and imperial politics. Local government may bring politics to the cottager's door; a parliamentary vote should raise the cottager to a higher level of political vision. Only in that vision will he see the need of sacrifice and service, bridge the distance which separates and unites his interest and the common weal, and learn the lesson of accommodation. The salt, unplumbed, estranging sea long turned the Englishman's gaze inwards upon his self-sufficient liberties; and a parliament which satisfied his insular aspirations fulfilled his conditions of constitutional perfection. Our kin from afar may train our eyes to scan a wider horizon. It remains to be seen whether the parliament, through which we escaped from the valley of parochial politics into the sphere of national action, can lead to even more extended views. In parliament all the estates of the realm were absorbed and made one for the common weal of England. Can British dominions be absorbed and made one for their common weal in a parliament which shall be no longer a parliament of estates but a parliament of the British realms?

CHAPTER XVIII

THE BRITISH REALMS IN PARLIAMENT [1]

THE design of the foregoing chapters has largely been to indicate the transitional character of every phase of parliamentary development and to emphasize the elastic nature of parliament itself. That elasticity has been somewhat impaired in modern times, and conservatives loved to dwell on the impregnable rocks and rigid foundations of the British constitution, ignoring the fact that rigidity is the death of every living organism. At a period when the elasticity of parliament is of supreme importance to the future of the British realms and of parliamentary institutions themselves, it is well to remember that parliament, which seems to us so definite an institution, was for long nothing more precise than a method of government by debate, and that the sovereignty of parliament is merely an attempt to realize the supremacy of reason. It is well also to remember that when an institution becomes the slave of its own forms and loses the capacity of adaptation and expansion, it courts extinction. The formalism of Anglo-Saxon jurisprudence involved its supersession by the practice of Henry II's judges; and the conservatism of the common-law courts at the close of the middle ages nearly led to their destruction at the hands of Roman lawyers, prerogative courts, and Tudor despots. If parliament undergoes a similar process of petrifaction, it will in time become a fossil.

It is not that Anglo-Saxon peoples with parliamentary

[1] This chapter was written in August 1915; a sentence or two relating to the German and Russian constitutions have been changed from the present to the past tense.

marrow in their bones are likely to seek refuge in non-parliamentary methods of government. The question is, whether the high court of parliament, the particular institution in which those methods have been enshrined and developed for national purposes, can adapt itself to wider purposes, or whether new needs will provoke new methods, growing into other institutions. The imperial conference might become an imperial parliament, or the British parliament [1] might absorb the imperial conference. In either case parliamentary institutions would be preserved; but in the former, the existing imperial parliament would sink to a local legislature, and in the latter it would have to undergo a far-reaching transformation. There are, indeed, signs that the traditional English method of settlement by discussion is stronger than the newer omnicompetence of a crystallized house of commons; and, to the discomfort of pseudo-constitutional purists, the decisive discussions over the Insurance Act in 1912 took place outside the house and between representatives who were not its members. In point of fact, this was an unconscious reversion to medieval practice by which the estates had settled details of finance and their attitude towards petitions outside parliament, and had merely reported the result by the mouth of their Speaker to the high court for acceptance or rejection. The precedent of extra-parliamentary debate is likely to be followed on an ever-extending scale; and there seems no reason why it should not, provided that the representatives of the community, who bargain with the parties, are responsible to parliament and that parliament retains the power of ratification or rejection. Legislation is growing too complex for profitable discussion of its details by a body of seven hundred general practitioners of politics; and it is better debated—in its details, at least—between the expert bureaucrats who inform the minister and will have to apply the

[1] The term imperial parliament, as applied to the existing British parliament, is bound to become more and more an anachronism. From its cognizance are already in practice excluded the commercial relations of the great dominions; and the more British foreign policy is made a matter of common concern to British dominions, the less will be the control exerted over it by a parliament of the British Isles.

legislation, and the spokesmen of those who will suffer or profit from their administration.

Parliamentary government does not therefore involve government of everything by one parliamentary method or by a single parliament. The exigencies of the empire have long ago disposed of that sort of unity and uniformity; and the problem is how to preserve a common bond between the various methods and institutions, and to prevent the specialization of functions from developing independent species. In other words, is the British empire a state or a collection of states? The question was once asked of a British student who had spent some years in Canada whether he would describe the British empire as a state, and he said "Yes." He was then asked whether he would have given the same answer in Canada, and he said "No." Events are moving rapidly, but that dissonance remains a faithful reflex of the imperial situation; and with it remains the doubt how long it will be possible in different parts of the empire to give diametrically opposite answers to the same question. Our immediate concern is to consider whether, if at all, parliament will be the means of finding a solution.

It is not theoretically essential that parliament should be the bond of unity in an empire. It was not the reichstag which gave substance to the unity of Germany, nor did Roman unity owe aught to parliamentary institutions. Religion has sometimes formed a basis, and it was, perhaps unfortunately, the strongest tie between all the Russias of yesterday. But churches, inasmuch as their ultimate appeal is to the individual soul, tend to be fissiparous; and the amalgamation of churches has been of the rarest and most local occurrence. No church could provide a foundation of unity for the British realms. The crown has to be presbyterian in Scotland and anglican in England; and, had not the impossibility of identifying church and state been recognized in time, the crown might also have been roman catholic in Ireland and heaven knows what in other of its dominions. So long as unity was attempted by

religion, the effect was rather to distract the crown than to unite the churches. Race has been a commoner bond than religion, but race breaks down as the link of British unity, and racialism is rather the bane than the basis of the empire. Language is in a somewhat better case; but the events of 1776 proved that language was no specific against disruption, and there are millions of white citizens in British realms who speak no English. Customs, again, traditions and history are as diverse as they could be in the British empire; indeed, in these respects there is no more unity in the empire than in the world. Where then is that differential basis to be found on which to build a British state of such divergent elements? Race, religion, history, and language stand for so much in men's culture that they leave but little room for the other foundations of community.

It is clear that those foundations can only be political, not racial or religious. The greatest political failure of any people in the world's history has been that of the Jews, and that wonderful race failed in politics because of its racial purity and its religious concentration. The jealousy of their God left no scope for the state; and it needed Christianity to find room for Cæsar in a Jew's allegiance. Ever a church, but never a state since the dispersion, the Jews owed their failure to their repulsion of gentile elements. A Jew can assimilate almost any quality, but he cannot draw gentiles into his fold. So, too, the German can transform himself into any other nationality, but he cannot make others German to any appreciable extent, and within the heart of Germany there are alien colonies which have resisted for generations the permeation of German culture. For this reason the German was driven to force as his panacea; the lack of political attractiveness made him a repellent militarist; and, however brilliant the triumph of military genius and organization, empires won by the sword have a habit of falling on their own weapon. Militarism, at any rate, is not the bond which binds the fabric of the British realms. They are only held together by consent, and that consent is based upon political considerations,

some of them merely sentimental, some of them idealistic, and others severely practical in character.

It is only in the political sphere that the essential claims of the state are valid or will be admitted. So discordant is the voice of the state from those of the churches, that there is no longer an established church, outside England, in the whole of the British empire, and free churches mean everywhere a limitation of the state. The absolutism of the state, upon which Hobbes and Austin dilated, is, in fact, an ambiguous term. Within its sphere the state, whatever its form, must possess a final authority, but that authority, while absolute in degree, is not unlimited in extent. The state therefore can only be built on foundations that lie within its jurisdiction; and it is only by recognizing the limits of its sphere that the state can expect recognition of its authority within that sphere. Theology, if not religion, certainly lie outside; the state does not now dream of establishing truth and is even shy of creating legal fictions. The circumstance that Germany acted on Hobbes's maxim, "in the right governing of opinion consisteth the right government of man," indicated a fundamental distinction between British and German conceptions of the state. Attempts on the part of the state to determine language are also illegitimate, and constitute a manifold cause of friction. Social customs are an equally dangerous field of interference; and, in spite of recent appearances, there are grounds for maintaining that the absolutism of the state has been purchased by the limitation of its sphere, and that its theoretical omnicompetence depends upon the widening circle of things it does not attempt. It is at least perfectly clear that if the British realms are to be a state, the jurisdiction of that state will be severely restricted.

But again, the problem may be obscured by the inevitable use of the term "the state." It is easier to conceive of the British realms forming a community, or perhaps a commonwealth; and the absolutism of the community does not suggest the same perplexities as the absolutism of the state. For one thing, it does not imply antithesis to the church.

It does not, in fact, isolate one aspect of human activity and proclaim its supremacy over all the rest. Even those who hold that the state is man in the state, often lose sight of man in the state, just as others lose sight of man in the church. This veiling of humanity breeds a greater antithesis between church and state than there is between man as a political animal and man as a religious being; and the community or commonwealth embraces both, promoting concord in the place of conflict. Concord, however, is only possible in the British realms through the surrender of much that clings to the state, its uniformity and its omnicompetence, if not also its appearance of unity. The old French ideal of *une foi, une loi, un roi* is clearly unattainable; the British realms have one king, but they have many faiths and many legal systems, and only such unity is possible as is compatible with an infinite variety.

Underlying these varieties there is, however, room for one foundation. Indeed, it is no paradox to say that the greater is men's attachment to their particular culture, the greater is their need of the British empire. The self-sufficient independence and seclusion of small communities is in a parlous state to-day, when might is ever growing and the world is ever shrinking; and liberty within the British empire is a better security than independence beyond its pale. The case would be different if the purpose of the British empire were, as it has been alleged, to give each of its citizens an English mind. The idea of the British empire is, rather, to provide its citizens with the means of developing minds of their own, and no sane Briton wishes to make a French-Canadian indistinguishable from a South African Boer, or even a Welshman exactly like a Scot. There are many mansions in the British empire, and no one wants to build them all alike or fill them with a homogeneous population. For that and for other reasons, empire is not a happy term; it implies an unconstitutional authority, military domination, and rigid uniformity. The essence of the British realms is government by consent, liberty, and heterogeneity.

This freedom to develop along lines of their own is the quality in the empire which its dominions value most; and it might seem that here was substance enough without grasping at the shadow of an imperial sovereign state. Indeed, the imperative, exigent tone of the absolute claims of state sovereignty involve no little risk to the finer threads of feeling which really unite the British realms. It is not as a state which extorts, but as a community which grants, that a British commonwealth may develop a common organization. No British realm will merge itself in an absolute British commonwealth, after Hobbes's conception of a commonwealth by institution, when every man was supposed to have surrendered all his rights, including his rights of conscience and private judgement, to a common despot. The compact would necessarily be a combination of Hobbes's and Locke's ideas: it would be an agreement among the British realms to set up a single imperial government, but only for certain purposes, and the compact would be a treaty by which the imperial state would be bound. It could not be an absolute state. Even in that model union of 1707 Scotland reserved its religion, its law, and its justice, and required specific advantages. It will be long ere British realms consent to a uniform tariff policy, or to a common taxation. Indeed, a common taxation is impossible where conditions are so divergent: import duties on corn, which Canada would not feel, would ruin the English working classes. Land taxes which Australia and New Zealand bear with equanimity, would revolutionize English society. Neither the dominion of Canada nor the commonwealth of Australia has yet been able to impose direct taxation on its component provinces and states; and to imagine a central government in London imposing on the dominions what the dominions cannot impose on their provinces is a phantasmagoria of visionary enthusiasm.

Political unions which last are not made in a moment nor without the co-operation of deep-seated causes; and there is always danger in arbitrarily selecting one out of the many forms of union adopted in British realms and imposing that

as a standard on others. The Anglo-Scottish and the South African unions, even if we add New Zealand, do not constitute a rule. Against the Scottish must be set the Irish union, by way of warning and not of example; and against the South African and New Zealand constitutions must be set the federation of Canada and the still looser combination of the states of Australia. There remain the disunited West Indies, scores of other colonies, and the empire of India, with its hundreds of semi-independent principalities. They represent every stage of political development; and democratic expedients which suit Canada and Australia would be disastrous in other realms of the empire. No common standard of self-government is applicable, and it is irrational to suppose that a central authority could rule these diverse dominions so well as the expert and specialized governments which control them at present. The government of the empire is, in fact, only possible through a diversity of methods adapted to a diversity of needs; and only the elasticity of mind, which comes of political aptitude and experience, tolerates such diversity. If the average British elector really determined such questions as the locality of an Indian capital or the careful adjustment of Indian self-government and the Indian civil service, he would decide them by the sort of criteria he applies to his own local environment, and the result would be chaos.

No doubt men are heedless of things for which they are not responsible, and the increase of responsibility is a potent factor in political education; but the imperfection of the result in matters for which the responsibility is immediate and direct, counsels caution in our expectations from a responsibility which cannot be felt. It has often been said that a democracy cannot govern an empire; the truth is, that an empire such as the British cannot be governed on exclusively democratic principles, and democracy is apt to regard its principles as valid at all times and under all circumstances, and as matters of simple right and wrong which only original sin leads men to dispute. It is easy to say that imperial questions should be decided by an imperial elector-

ate; it is less easy to define that electorate, and still less so to create it. We doubt the expediency of giving a vote in Indian affairs to an Indian electorate which cannot read or write; to give them a vote on all the affairs of the British realms would be a fantastic form of imperial suicide. The problem of colour would be accentuated and not exorcised by a popularly-elected parliament representative of the empire; and no principle is sounder in practice than that which denies responsible self-government even to Englishmen who are a handful among a vast coloured population. The great dominions deservedly call for a greater share in the control of imperial policy, but we cannot, in reconstructing the empire, ignore our own West Indian history, or the practical limitations under which the United States pretends to combine democratic principle with the facts of the negro question.

Practically the problem of an imperial parliament which shall represent more than the British Isles resolves itself into a question of how to include Canada, Australia, New Zealand, South Africa, and Newfoundland; and thus limited, it is not entirely impracticable, provided that an enthusiasm as unhistorical in its outlook as that of the first French Revolution does not seek to solve it wholly at one gigantic *auto-de-fe*.[1] There are common foundations on which to work. Common politics, as the genesis of parliament has shown, are the outcome of common law, and English law is the groundwork of all colonial constitutions. A judicious admixture of Roman law and other systems is not inadmissible, as we know from Scotland and South Africa; but one of the most fruitful suggestions for empire-building was made by Lord Haldane, when he outlined a proposal that the judicial committee of the privy council should periodically appear in sessions throughout the British realms. By such judicial eyres Henry II had brought royal justice home to his subjects and, more important from our point of view, had made the same law common to

[1] *Auto-de-fe* is properly an "act of faith"; it came to mean a holocaust, and the *auto-de-fe* proposed in some quarters would involve a holocaust of the many constitutions in the empire.

all England. Thus he had done more perhaps than any one else to create an England out of a congeries of tribes. The diversities of law throughout the empire to-day are not more multifarious than those in the mother country in the eleventh century; and the court that could hammer out and apply a common law of the British realms would be doing as much to create a united empire as Henry II and his judges did to make England by creating its common law.

Without this common law parliament could not have grown; and, indeed, it was well that the common law was the plastic work of judges, and not the cast iron of a parliamentary statute. No one could have drafted it or put it into an act; it had to grow from case to case through centuries of judicial argument and experience, and various were the materials moulded together into the final product. It was but partly Anglo-Saxon; and an imperial common law would leave out a great deal that is English, particularly in the sphere of real property, and would incorporate some things that are not. So, too, it will not be made by statute or embodied in a code; it must needs be the outcome of judicial experience garnered by the highest legal minds in sessions throughout the empire. Statutes might come later: the judges of the king's court not only gathered experience on their eyres, discussed it in common sessions of the council, and applied it in Westminster Hall; they also drafted their deductions into statutes, which were promulgated in the high court of parliament. So our imperial justices-in-eyre might draft into statutes for submission to an imperial parliament the fruits of their imperial missions.

Their labours would be facilitated and their prospects improved by their restoration to something of their original status in the constitution. Their gradual degradation, as the king's council in parliament was perverted into a house of lords, was doubly unfortunate; it impaired the constitutional authority of the judges and the legislative skill of parliament; for, however expert may be the staff of our present drafting department, its members have not the experience of the

judges who were wont to determine the form of legislation. It led also to the illogical growth of two supreme courts of appeal. The judicial committee of the privy council represents the king's council out of parliament; the law lords represent the king's council in parliament. But these two courts were not in earlier times co-ordinate; the medieval king's council in parliament was superior to the king's council out of parliament, could resolve its doubts, remedy its errors, and direct its action. It might have retained its superiority but for the reduction of the judges of the council in parliament to the status of assistants in a house of uninstructed peers. The intrusion of an hereditary caste into the technical sphere of appellate judicature was the cause of the disjunction; it was removed when the peers abstained from exercising the judicial functions they had assumed; and there seems no adequate reason why the two courts should not be united into a single supreme imperial court of justice. The *personnel* of the two courts has much in common; but the lords sit in some state to hear appeals from the British Isles, while the judicial committee shrouds itself in mean obscurity to hear those from great dominions overseas

The house of lords might possibly be used for further imperial purposes. No sane politician wantonly interferes with vigorous institutions, but the house of lords is moribund; it has, in any event, to undergo a radical reformation, and the peers' necessity is the statesman's opportunity. It is, at any rate, worth inquiry whether the house of lords could not be reconstituted to meet in some degree the desire for a more adequate representation at Westminster of our overseas dominions. An attempt at reform in this direction would necessarily involve the abandonment of the principles of heredity and primogeniture. None of the overseas dominions has tolerated the introduction of these principles into their councils or their legislatures; and an imperial chamber based upon them would have no attraction for the empire as a whole. Nor, as a matter of fact, would it receive much serious support within the British Isles.

The difficulty is to find some principle that does commend

itself as the basis for a second chamber. Various expedients have been tried in different parts of the empire. Second chambers have been selected by nomination, sometimes for life, sometimes for a period of years. They have been constituted by election, sometimes on a restricted, and sometimes on a democratic franchise, sometimes by small constituencies, sometimes by provinces as a whole. The result has everywhere been much the same, and second chambers are the political failure of the British empire. It is not only in the British Isles that a second chamber is threatened with mending or ending: the cry is also heard in Canada, where the second chamber is filled by nomination, and in the states of Australia, where it is elected. The truth seems to be this: it is doubtful wisdom to set two bodies of men to do the same work; but, admitting the wisdom, the two bodies should not be alike. The house of lords has probably given more whole-hearted satisfaction, albeit to a minority, than any other second chamber in the empire, because it is so unlike the house of commons. If the British realms are to be asked to abandon any part of their constitutions to the imperial melting-pot, they will one and all find it easier to sacrifice their second chamber than anything else; and it is not at all impossible that something might be made of this refuse in the imperial crucible.

A hint might perhaps be borrowed from the United States. Its senate is not by any means an ideal body, though the recent change to the popular election of its members may make it more responsible; but it is undeniably the strongest second chamber in any Anglo-Saxon community, and its strength is due to the fact that it is based on a clear principle, distinct from that of the house of representatives. The house represents the people of the United States as a whole; the senate represents the states of which the union is formed, and it is the special guardian of their rights. The house is based on numerical population; the senate contains two representatives, and no more, from every state, whatever its population. A house of lords, reconstituted so as to comprise representatives from every British realm and colony

would not be more out of touch with the British electorate than it is at present; it would be vastly more capable, and its value as the king's imperial council in parliament would be far-reaching. The vast majority of electors in the British Isles would gladly see some such body substituted for their existing house of lords, and it is quite possible that the dominions would consent to a similar substitution. There would thus in the British empire be a variety of first chambers, but a single second chamber, constituted on a principle which would give it weight and independence. It would possess a qualification indispensable in an efficient second chamber, namely, a differential basis from the first. There would be no doubt about its strength; there might be some fear that its strength would impair the democratic self-government of the individual realms, but this danger would be met by differential work corresponding to its differential basis.

Politics stand in constant need of searching analysis, and nothing confuses political thought more seriously than the assumption that democracy means the determination of all political issues by popular vote. In practice democracy combines with it a strong admixture of monarchy and aristocracy; a British prime minister is more of a monarch than many who bear the title, and some have approached dictatorship; a cabinet is a genuine aristocracy, because cabinet rank is (as a rule) attained by merit and not by inheritance. Both institutions are essential to modern democracies. It has, moreover, already been pointed out that whole categories of public questions are decided without reference to the electorate. The dividing line between those which are, and those which are not determined by the ballot, is naturally and properly determined by the electors, not consciously, but through the influences to which their minds are subject. An issue on which many votes will be turned will infallibly be brought with prominence before the electors; an issue to which they are indifferent will be decided without a popular consultation. The foreign policy initiated by Lord Lansdowne in 1903–4

was an issue of supreme importance; but no one dreamt of fighting a general or even a by-election upon it. Even the sanction of the house of commons was not required for it, or for such a step as the grant of responsible self-government to the Boer colonies. On the other hand, no cabinet could sanction a religious catechism in elementary schools, limit the number of public-houses, or carry a scheme for national insurance without risking shipwreck on the rock of popular indignation. The line between the two categories of public questions is not, of course, hard and fast; but it is deep enough to provide a discrimination between the functions of a popularly-elected house of commons and an imperially-constituted second chamber. The latter would thus have differential work as well as a differential foundation.

The change would involve an act of imperial union, an expansion of sphere, and a specialization of function. The second chambers of the empire would be formed into one, the sphere of which would be expanded; and instead of each realm having two chambers performing similar functions, the imperial second chamber would specialize on imperial questions, and the first chambers on domestic questions. This, it may be objected, provides for two chambers, but not for the functions assigned by convention to a second chamber. Both would, so to speak, be courts of first instance, and there would be no court of appeal. The objection is not irrelevant; but the inadequacy with which second chambers have fulfilled their function as courts of appeal from the first, however they have been constituted, suggests the doubt whether it is a legitimate function. No second chamber, in fact, claims any right to decide the appeal, and a court of appeal which cannot decide seems somewhat superfluous. The real court of appeal from a first chamber is not the second chamber, but the electorate; and of recent years second chambers have generally confined their claims to a right of reference. The necessity for this safeguard clearly depends upon the period for which the first chamber is immune from a general election; and a shortening of that period might be a simpler method of

bringing home responsibility than the somewhat spasmodic action of second chambers. If, however, this power of reference were retained, it would be exercised to more general satisfaction by an imperial chamber than it is by existing institutions. The universal complaint is that the power of reference is invariably used for party purposes, and the general demand is for its impartial exercise. Now impartiality can surely be expected with greater confidence from a chamber composed of members drawn from all parts of the empire, and mostly without party interest in the dispute, than from local chambers consisting almost exclusively of members belonging to the parties involved. Independence would accompany impartiality, and inasmuch as the issues are always between two political parties of which neither chamber is now independent, the question of reference to the electorate would better be left to a body containing at least a large external element.

A more fundamental problem would be the control by the lower chamber of the functions and powers of the upper. There is no escape from the tyranny of finance: he who pays the piper calls the tune, and the chamber which finds the revenue will determine its destination and define the objects upon which it shall be expended. The deduction will be drawn that there can be no imperial unity unless the single imperial second chamber controls imperial finance. If that deduction is valid, imperial unity is a distant prospect; for a single taxing assembly for the whole empire is not yet possible, however complete its representative character might be. Taxes are things which electors feel, and upon which they really do vote at elections. The parts are not so lost in the whole that Australians and Canadians will pay taxes imposed by a chamber in which Australia and Canada would have a vote, but not a veto; and Polish history tells the tale of assemblies in which individual delegates have a *liberum veto*. Whatever imperial revenue may be required will have to be granted by the individual representative chambers of the several realms. Those chambers would act like the estates of a medieval parliament: the

financial needs of the empire would be laid before them, and each would make its own response in the form of a grant. Each, too, would be responsible for its methods of assessment, incidence, and collection. In one dominion the imperial contribution might be raised by a tariff, in another by income-tax; in one by a tax on land, in another by an excise duty on spirits. The essential condition would be that each would manage its own finance, for no British realm would tolerate intervention in so domestic a matter. The one source of revenue which might conceivably be at the disposal of an imperial second chamber would be an imperial tariff; but the reorganization of the empire will have some time to wait if it is postponed to the adoption of that proposal. No one can circumscribe the future, and the British realms may grow so close together that not merely an imperial tariff, but an imperial income-tax might be levied by a single imperial chamber. We are considering less distant possibilities.

It does not follow that even during this interim the imperial chamber would be impotent in finance because it could not levy taxation. A chancellor of the exchequer is not powerless because he cannot tax by edict, and it is quite possible to conceive the financial recommendations of an imperial council having as much weight with the voters of taxes as the proposals of a chancellor. The imperial council would frame estimates of the expenditure needed for imperial purposes; it would suggest the distribution of the burden; and from a body, in which all the realms were properly represented, it would not be unreasonable to expect an equitable allocation. Given these conditions, the individual chamber which refused to provide its share of supply would be incurring a grave responsibility and a serious risk of forfeiting the confidence of its constituents. Common feeling and public opinion is already keen enough throughout the empire to guarantee the readiness of each of the realms to shoulder a share in the common burden.

So far we have got, in our imaginary constitution, one crown and one imperial chamber, combined with a variety

of houses of commons or representatives. The crucial point is the question of the executive. The anomaly of the existing constitution is the existence of an imperial executive without any regular relation or responsibility to an imperial chamber. It is responsible solely to the British house of commons, and other British realms have no formally reorganized constitutional right to any share of control over the foreign policy in which they are involved, or the declaration of wars in which they spend their lives and treasure. Tentative steps have, indeed, been taken to mitigate this anomaly: at the last imperial conference before the war, Sir Edward Grey admitted its members to the secrets of British foreign policy, and more recently the prime ministers of Canada, Australia, and South Africa have attended British cabinet meetings. It is well that the elasticity of our constitution should permit of such experiments and should oppose no bar to the growth of a really imperial cabinet. Much of the constitution has been erected in this tentative way without formal legislation; and it would be rash to abandon that method for the alternative plan of constitution spinning.

But even tentative steps must have a direction and goal; and we might have a clearer idea of direction if we could know what was said to and by Sir Robert Borden, Mr. Hughes, and General Botha during the cabinet meetings made famous by their presence. We might also gather some hints from Lord Kitchener's attitude during the cabinet deliberations on the Welsh church suspensory bill or the home rule act in September 1914. He was in the cabinet for the purposes of the war, and Sir Robert Borden, Mr. Hughes, and General Botha were asked to attend in the interests of the empire.[1] What would they have said on peaceful domestic topics like Mr. Lloyd George's budget of 1910 or insurance bill of 1912? The rôle of a sleeping partner would have been the most convenient attitude; and a cabinet of the empire would be atrophied for domestic

[1] From 1917 to 1919 General Smuts was a full member of the war cabinet; and the problem now is to adapt the temporary expedients of war to the permanent uses of peace.

purposes, just as a domestic British cabinet too nearly approaches atrophy for the purposes of the empire. The divergence leads straight towards two sets of executives: a single executive for imperial purposes responsible to the single imperial chamber, and a series of domestic executives for each self-governing realm responsible to their respective domestic legislatures. The control at present exercised by the British government over India and those colonies which do not possess responsible self-government would naturally be vested in the imperial cabinet and imperial chamber.

Such an arrangement would involve both a definition of functions and the provision of means to prevent a division of will. The evil to be avoided is the conflict of jurisdictions; and two independent sets of executives and legislatures, one dealing with imperial and the other with domestic affairs, would be certain to come into conflict unless there were means of regulating their relations with one another. Here again finance would be the determining factor; and the chambers, which controlled supply and the domestic executives, must also control, directly or indirectly, the imperial chamber and the imperial cabinet. The imperial cabinet would be immediately responsible to the imperial chamber, but the imperial chamber itself would be responsible to the dominions.[1] Its members might be selected by three alternative methods: they might be the nominees of the domestic dominion executives; they might be chosen by the domestic dominion legislatures; or they might be elected by the peoples of the dominions. The objection to the last method is that imperial issues do not, as a rule, evoke any wide and intelligent popular interest, and the local qualifications which commend candidates to so many constituencies are singularly out of place in an imperial election. The objection to the second is that indirect election usually fails of its object: the American college of electors, which was intended to collect the wisdom of the nation, consists of ciphers; while the conduct of United States senators

[1] The word is intended to include Great Britain and Ireland.

has been explained on the ground that they were elected by legislatures, and not by the people, and election by legislatures has recently been abandoned in favour of popular choice. An American senator is, however, the special representative of local interests; the members of an imperial British chamber would be chosen for an exactly contrary purpose, and a different method might be more appropriate. They would resemble the agents-general of the dominions, and might be appointed by similar means. The superficial resemblance of such a chamber to the old bundesrath of the German empire may be enough to condemn it for the moment. But there would be two fundamental differences: firstly, the members of the bundesrath were appointed by governments which were not responsible to the people of the states they represented; and secondly, our imaginary chamber would not possess the extensive control which the bundesrath exercised over domestic legislation. It would, no doubt, be desirable to synchronize general elections throughout the empire, and the new dominion governments would thus simultaneously select their representatives to the imperial chamber. But this would hardly be possible; and a change of dominion government would not necessarily involve a recall of imperial representatives any more than it does a substitution of agents-general, or a change in the British government involves a re-appointment of ambassadors or of members of the imperial defence committee.

There remains the problem of delimiting the spheres and powers of the imperial chamber and the dominion houses of commons. It is thorny enough, but there is no reason to think it more insoluble than the kindred problem of defining the respective spheres of dominion and provincial parliaments in Canada or Australia. Most of the functions of government are sorted by nature into one or other category. Foreign affairs, imperial defence, issues of war and peace, belong obviously to imperial government; questions of religion, education, the franchise, social reform, labour problems, public health, insurance, appertain no less distinctly to the domestic sphere of the dominion

parliaments. Between the two spheres there lies an important borderland, including the treatment of native races, commercial policy, naturalization, citizenship, and marriage; and it would be essential to leave its frontiers as elastic as possible. There might be concurrent rights of legislation, while the growth of unity would facilitate a gradual increase of imperial influence in this sphere. There would have to be a written constitution, but the less of it the better. The working of a constitution never really depends upon its form, but upon the spirit which informs it. If the peoples of the British realms want a united empire with a common government, they will get it and will work it, whatever the defects of its constitution. If they do not, no constitutional machinery, however artistic its construction, will attract them.

Nor is it of much use attempting to frighten them into political upheaval by logical dilemmas, after the fashion of Hobbes's idea of the social contract. According to him the life of man in the state of nature was "nasty, short, brutish and mean," so intolerable, in fact, that he was left no option but to submit himself to an absolute sovereign as protector. According to some of our modern imperialists, the British realms are in an equally parlous condition; there is no alternative to disruption but fusion in a single state. Such logical dilemmas have no terror for the historian, for history consists for the most part of solutions of logical impossibilities; *solvuntur ambulando.* The empire is not in the parlous condition depicted: it will not split into fragments because its parts decline to fuse. It lightly evades the horns of the dilemma, of being "either a phantom or the most intolerable of oppressions," because it is not "a democracy pretending to sovereignty over other democracies." Canadians and Australians are not our subjects, but our fellow-subjects, or rather partakers in the sovereignty which is the capital of the empire. The partnership is not perfect; but it is none the less real because its terms have not been stated in a written constitution.

Neither was it a phantom that the crucial test of the great war revealed. For, when all is said and done, political unity is a thing of the spirit, and not a bond of parchment; and Germany's challenge to all for which parliamentary government stands could not have met with a finer response from the British realms, had they all been merged in a single state. The heart and the head of the empire were sound. Its peoples grasped the fundamental issue of the war. The Germany, which provoked it, began with Bismarck's defeat of a parliament and its principles, and developed a natural alliance, first, with the Hapsburgs and then, by a logical consummation, with the Turk; and the conflict ended, as it was bound to end, in defeat at the hands of parliamentary peoples, after a struggle in which the one autocracy among them went to pieces.[1] Upon those parliamentary principles the British empire is based; it stands for the force of argument against the argument of force, for the rule of law against the rule of the sword, for popular consent against the will of monarchy or militarism masquerading as the state. If the Allies had failed, parliamentary government might have perished from the earth. Through their success peace will be placed on the broad foundation of common acceptance by the world of principles, dimly discerned in the middle ages and wrought out in hundreds of parleys, until the parleys themselves grew into a parliament and a mother of parliaments, and their reason supplanted force as the rule of human affairs.

[1] This passage, as originally written in August 1915, ran: "it will end in defeat at the hands of parliamentary peoples after a struggle which bids fair to convert the one autocracy among them to belief in responsible government."

APPENDIX

PICTURES OF PARLIAMENT

THE illustrations herein reproduced refer exclusively to the development, in the "parliament chamber," of those "parliaments" of the king in council with other representative and non-representative elements of the nation, which in modern times became the house of lords. That development is historically the essential feature in the evolution of the English parliament, and it is the most difficult to grasp. The growth of the house of commons, from its original sessions in the refectory and chapter house of the abbey to its transference to St. Stephen's chapel in the palace and subsequent encroachment upon the neighbouring "parliament chamber," is another story, simpler in its details, subordinate in its historical, though not in its political importance, and lacking pictorial representation until we come to the seventeenth century. We are here dealing with the pictorial evidence for the earlier stages of our parliamentary history.

The first of our reproductions is the earliest which possesses much historical value. There are pictures of an older date representing the king in parley with some half a dozen or more councillors, which are correctly entitled "the king in parliament" and are valuable as illustrating the fact that the first parliaments were simply parleys of the king in council. But they represent only the germ, and are without exception centuries later than the parliamentary conditions which they profess to portray. Our first illustration, on the other hand, while it correctly contains traces and relics of earlier stages of parliamentary development, is an exact and contemporary representation

of the parliament of 1523. Its date and provenance can be determined with some precision. It was first reproduced by Richard Fiddes (1671–1725) in his *Life of Cardinal Wolsey*, published in 1724 (p. 302); and the drawing, from which the reproduction was made, was sent to Fiddes from the Heralds' College by John Anstis, then Garter King of Arms—in whose house at Putney Fiddes died in 1725—with a long explanatory letter which is dated 2 Jan., 1722–3, and is printed by Fiddes (ib. *Collections*, pp. 108–14). In this letter Anstis remarks that "though this draught be meanly performed, yet it must be allowed to be of authority . . . since it was designed by the order of the then Garter King of Arms and preserved in a fair velom manuscript which hath his name and arms in several places and likewise represents him performing his duty at this parliament in his proper robe and place." The "then Garter King of Arms" was Sir Thomas Wriothesley (*d.* 1534), of whom Anstis gives an elaborate account in his *Order of the Garter* (i., 369–73). He had been created Garter in 1505 and confirmed in that office on Henry VIII's accession; he was father of Charles Wriothesley the chronicler, and uncle of Thomas Wriothesley, lord-chancellor and earl of Southampton.

The picture represents the opening of parliament on 15 April, 1523. The last parliament had been opened on 5 February, 1514–15, but Wolsey was not then a cardinal, while he is here represented as sitting above Warham, archbishop of Canterbury, and next to the throne, with a cardinal's hat over his head and above it the arms of the see of York impaling Wolsey's own; and it was only after 1515 that Wolsey took precedence of Warham. The figure standing behind the traverse, between Wolsey and the king, is Tunstall, bishop of London, who delivered the opening speech in 1523.[1] The other two figures behind the archbishop's seat are two priests bearing, according to

[1] *Rot. Parl.* 14, Hen. VIII, prefixed to *Lords' Journals* vol. i. p. lxxv; *Letters and Papers of Henry VIII*, iii. 2956. The *Lords' Journal* for 1523 is not extant. Wolsey, as *legatus a latere*, seems to have disdained the parliamentary functions of a chancellor; hence Tunstall's oration.

Anstis, Wolsey's two crosses as cardinal and archbishop, and not one belonging to him and one to Warham (Fiddes, *Collections*, p. 110). On the front bench running down from the right of the throne and of the cloth of state sit the bishops in their order of precedence, and behind them the abbots, the latter extending on to a cross-bench. Dimly seen behind that cross-bench are the commons, standing at the bar, with Sir Thomas More, their Speaker on this occasion, in their midst. On the front bench stretching down from the left of the throne sit the temporal peers. First comes the duke of Norfolk, who holds in his hand the Lord High Treasurer's staff; next to him is the duke of Suffolk. There were only two dukes in England in 1523, and only these two wear the four ducal bars of white miniver on their robes. The earls, who come next,[1] have only three. The barons begin on the cross-bench, and the first is the "premier baron of England," namely the Prior of St. John's, who, although reckoned a spiritual peer in earlier times, is described as the "premier baron" in Edward IV's and succeeding reigns down to 1540; he is indicated by his different robe. The line of barons is continued from the cross-bench to the bench behind the dukes and earls.

Returning to the cloth of state, we see three earls, one of them, apparently Worcester, on the king's right, bearing the cap of maintenance, and the other two, on the left, the sword and the earl marshal's baton; the latter was borne by a deputy for Norfolk, who was both earl marshal and lord high treasurer. The two figures behind the traverse on the king's left are non-episcopal and non-baronial councillors, and to their left is apparently a throng of eldest sons of peers, preceded by Garter King of Arms. On the highest of the four woolsacks, where usually sat the chancellor, are the two chief justices. Other judges sit on the woolsack running down from the right of the throne, and on the left, according to D'Ewes, who follows Glover, are

[1] D'Ewes, *Journals*, p. 11; the figure next to Suffolk might have been Dorset, England's only marquis at that date; but he was serving on the Scottish borders. Marquises had only three bars of miniver, like earls, and viscounts only two, like barons.

the master of the rolls, the chief baron of the exchequer, the king's council learned in the law, and the masters in chancery. But D'Ewes is writing a century later; and it is more probable that in this illustration the occupants of these two woolsacks are all judges, the fourth woolsack being occupied by masters in chancery and king's council, behind whom kneel the clerk of the parliaments and the clerk of the crown. The points of general interest are: (1) the pre-eminence of the crown, which Henry VIII further emphasised in 1539 by enacting that no one not a member of the royal family should presume to sit on the cloth of state; (2) the inner ring or square formed by the council in parliament; the specially summoned spiritual and temporal peers are accretions on that parliament of the council, which Maitland has called the core of every session; (3) the presence of the commons, headed by the Speaker, who alone and for himself alone claims liberty of speech in these parliaments; and (4) this scene is not laid at Westminster, but at Blackfriars, where the parliament of 1523 sat until its transference to Westminster in July. Parliamentary paraphernalia were still comparatively simple, and could be carted without difficulty from one meeting-place to another.

Our second illustration can be dated as precisely as the first. It is taken from Robert Glover's *De Nobilitate Politica vel Civili*, which was edited from his MS. and published by his nephew, Thomas Milles, in 1608, folio. Glover was Somerset herald, and both Camden and Dugdale owed a good deal to his antiquarian labours. He died in April 1588, and this picture illustrates his account of the opening of parliament on 22 November, 1584, which under the title of *Pompa Parliamentaris* forms part of the volume published by Milles in 1608. The text of that tract is the best commentary on the illustration, although some additional light is thrown by the account of Elizabethan parliamentary ceremonial which Sir Simonds D'Ewes incorporates in his *Journals* (pp. 11–12).

There are notable changes since 1523. The abbots and

published valuable engravings of the tapestries of the house of lords. It illustrates in a remarkable way the constitutional changes of the Revolution, and exhibits monarchy in tutelage: so far from no one being permitted on the cloth of state except the king, he is overshadowed by his magnates, and parliament is swamped with peers. The judges and other elements of the council have been reduced to a handful in a house of hundreds; but the peers themselves are threatened by the dominating figure of Speaker Onslow and the commons below the bar. The scene is the old house of lords, and there was little change until the fire of 1834 led to the comprehensive rebuilding of the palace on the designs of Sir Charles Barry, and under the name of the houses of parliament.

The last illustration is the plan of the old parliamentary buildings before the fire, made by the architect Sir John Soane, clerk of the works to the houses of parliament. It is dated 22 March, 1833, and was published in that year with the report of a committee of the house of commons on the parliamentary buildings. There are numerous other sketches and plans in the Soane Museum in Lincoln's Inn Fields. The drastic changes that were made by Barry's reconstruction can best be appreciated by comparing Soane's plan with some such plan of the modern houses of parliament as is given in Baedeker's *London*. Westminster Hall alone remains practically intact. The position of the house of commons has been completely changed; the king's robing-room remains much where it was, but the royal gallery has been interposed between it and the new house of lords, and the painted chamber has disappeared.

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